AN

ESSAY

ON

THE LAW OF BAILMENTS.

By Sir WILLIAM JONES, Knt.

LATE ONE OF THE JUDGES OF THE SUPREME COURT OF JUDICATURE AT BENGAL.

FROM THE LAST LONDON EDITION,

With Introductory Remarks, and Notes, comprising the most modern Authorities.

By JOHN BALMANNO,

OF LINCOLN'S-INN, ESQ. BARRISTER AT LAW.

In tutelis, societatibus, *fiduciis*, *mandatis*, rebus emptisvenditis *conductis-locatis*, quibus vitæ societas continetur, magni est judicis statuere, (præsertim cum in plerisque fiat judicia contraria,) *quid quemque cuique præstare* oporteat.

Q. Scævola, apud Cic. de Offic. lib. iii.

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TO THE HONORABLE

SIR SOULDEN LAWRENCE, KNT.

ONE OF THE JUSTICES OF

HIS MAJESTY'S COURT OF KING'S BENCH,

THIS EDITION

OF

THE LAW OF BAILMENTS,

IS RESPECTFULLY INSCRIBED,

BY

THE EDITOR.

ADVERTISEMENT

TO

THIS EDITION.

SHOULD the delay in publishing this Edition of The Law of Bailments be thought worthy of notice, it is hoped that the following circumstance will operate as an apology.

When the Essay was nearly prepared for the press, the Editor, in concurrence with the suggestion of a friend, was induced to attempt a sketch of the life of the late Sir William Jones, with an account of his works, to be perfixed to the publication:—some time was occupied in the collecting materials for this undertaking, and in its progress the Editor found that he must inevitably exceed the limits he had deemed it necessary to prescribe for its completion;—perceiving also that by the Introduction, Notes, and Appendix, now added, the size of the original publication would be considerably increased, he has declined to insert the biographical account alluded to, from a wish not to incur the charge of overwhelming a small though valuable treatise with extraneous matter. In a literary and critical point of view, the Editor has, perpaps, by this omission, better consulted his own reputation, and the justice due to the illustrious memory of Sir William Jones.

With respect to the work in its present form, the Editor takes leave to observe that his particular aim has been to render it an useful repository on the subject of BAILMENTS, to the MERCHANT and the STUDENT OF THE LAW; he has therefore occasionally dilated his references to the material modern cases, and has given, in the

form of an Appendix, the celebrated case of "Coggs v. Bernard," from Mr. Bayley's valuable edition of Lord Raymond's Reports.

Sir William Jones (Law of Bailments, p. 68) modestly intimates that his Essay may be considered in the light of "a commentary" on Lord Holt's famous argument in the case just mentioned; it is, however, one of those rare commentaries which merit equal attention with the text. To every class of persons in a civilised community, the subject of our Author's treatise is important; and of the work itself, it is no extravagant encomium to pronounce, that the learning of Lord Coke could not have supplied sounder law, and that more apposite and elegant illustration could not have flowed from the pen of Cicero.

These are sufficient reasons for presenting to the Public a new edition of THE LAW OF BAILMENTS; and in proportion to their weight, he who has undertaken the task will naturally be gratified, if it shall be thought that he has not performed less than his duty.

PUMP COURT, TEMPLE;
Nov 10, 1797.

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INTRODUCTION.

The commercial intercourse of mankind is at once the most pleasing and important subject of investigation: those various wants which pervade the most barbarous and refined conditions of society, stimulate the warlike savage to commence the labours, and to barter the spoils of the chase; while under a similar influence the inhabitant of the already opulent and civilized country endeavours to explore new sources of wealth, and tempts with avidity the perilous vicissitudes* of mercantile adventure.

Thus it should seem, that with whatever difference of local circumstances, and with whatever varieties of mental and corporeal character, Nature has distributed our species over the globe, she still intends that a general connexion shall subsist between them, and has caused it to depend on motives too powerful or inviting to be counteracted by ferocity, indolence, or caprice.

A propensity that so strongly indicates the policy of Nature ought obviously to receive every necessary encouragement from the policy of states; nothing therefore but ignorance, or a despicable affectation of philosophy, can doubt or deny the advantages of foreign commerce; our gratitude should avow, and our activity strive to increase them: it may however, in perfect consistency with this sentiment, be asserted, agreeably to the remark of a profound historian,† that the improvement of the domestic trade of

* 'Mercator * * * *
* * * * mox reficit rates
Quassas, indocilis pauperiem pati.' Hor.

† Hume's Hist. Append. III.

a country is to be considered as an object of much earlier and greater attention.

Notwithstanding this truth, so obvious and important, it is a remarkable fact in the history of commercial nations, that they have mostly established an extensive foreign intercourse, long before they appear to have thought of promoting the facility of their internal trade, and of protecting its growth, in the concomitant variety of civil transactions, by the application of those discriminating rules, which impart the ingenuity and the correctness of general reason, to systems of local jurisprudence.

What have been the specific causes of this neglect, the most acute investigation would probably be unable to discover. In the frequently inexplicable conduct of mankind, there is a crowd of instances in which advantages important, and easy to be obtained, are disregarded, for the pursuit of others more distant and precarious. When nations thus deviate from the path of prudence, they are slower in recovering the prospect of their true interest than individuals; as error when consolidated into a mass is proportionably less penetrable by the light of reason and utility.

However latent the causes why so great an object of national policy has experienced such a comparatively slight attention, it is easy to discern the beneficial influence which, if properly cultivated, it has a tendency to produce on the manners and resources of a people. Superficial and often vicious refinements may be communicated by foreign connexions, but it is indisputably true that the real civilization of a country depends much less on its commercial transactions with other states, than on a close and constant intercourse among its own inhabitants.—Such an intercourse is clearly requisite to supply a community with permanent means of subsistence and

self-protection, and to promote the growth of social sympathy and confidence among its various members.*

It is also by being thus early and steadily attentive to the essential purposes of their connexion in single states, that men become adapted to form more extensive political and commercial relations; for the mere wealth and intercourse of foreign traffic are not alone sufficient to give polish, humanity, and equity to national character, any more than permanency to national resources. Instances may be easily recollected of nations highly conspicuous in the annals of commerce, which have exhibited disgusting scenes of internal barbarism and disorder, and which have incurred in their public conduct the deserved imputations of fraud and cruelty.

The vices however which a community is liable to contract from a too eager and exclusive pursuit of foreign commerce, are not upon the whole by far so inimical to the happiness of the world, as the erroneous and destructive policy that converges all the talent and industry of a state into a focus of warlike ambition. The spoils of military aggression are palpably more criminal than the gains of commercial avarice, and they are equally fugitive: to obtain them the earth must be desolated; and when acquired, they constitute neither a just nor a permanent resource.

The pernicious effects of both these extreme pursuits are forcibly exemplified in the history of the celebrated rival powers of Carthage and Rome. The Carthaginians had engrossed nearly all the commerce of the ancient world; but their avidity in the acquisition of meretricious wealth estranged them from

* Vattel's Law Nat. b. 1. c. 8. § 84. 86. See also Smith's 'Wealth of Nations,' b. 3. c. 1. for a concise and masterly explanation of the principles of internal trade.

the more important views of sound policy and legislation: their deficiency in this respect was conspicuous in the duplicity which frequently sullied the character of their public transactions, and in the factious ebullitions* which destroyed the internal vigour of the state.

Under this peculiar disadvantage was the strength of Carthage opposed to that of Rome; and though the former, by the extent of its factitious resources, was enabled to protract the period of its downfall, yet the preserving energies and the severe discipline of the Romans, prompted by the congenial spirit of their political institutions, ultimately, and as it were by necessity, prevailed. It was in vain that Hannibal led his mercenary swarms with triumph over Italy, and threatened to approach the walls of Rome; he had to encounter his greatest opposition in the inflexibility of the Roman character; and the victories to which his illustrious military talents had chiefly contributed, were destined to immortalize the prudence of Fabius and the ardour of Scipio, and to

* It cannot be asserted that Rome was always free from the violence of party contentions; the great aims of the commonwealth were, however, invariably supported by the proud zeal of all its members, and the passions and importance of the individual were absorbed in the grandeur of the republic. This difference is thus remarked by Montesquieu in a work of less genius but of closer reasoning than the "*Esprit des Loix*."

'A Rome gouvernée par les loix, le peuple souffroit que le 'senat eut la direction des affaires. A Carthage gouvernée 'par des abus, le peuple vouloit tout faire par lui meme.

'Carthage, qui faisoit la guerre avec son opulence contre 'la pauvrete Romaine, avoit par cela meme du desavantage: 'l'or & l'argent s'epuisent; mais la vertu, la constance, la 'force & la pauvrete ne s'epuisent jamais.

'Les Romains etoient ambitieux par orgueil, & les Carthaginois par avarice; les uns vouloient commander, les autres 'vouloient acquerir; & ces derniers calculant sans cesse la 'recette & la depense, firent toujours la guerre sans l'aimer.' Grand. et Dec. des. Rom. c. 4. p. 34.

serve merely as brilliant preludes to that catastrophe, the cause of which has been superficially recognized in the luxurious indulgences of Capua.

The illicit conjunction of courage and rapine gave birth and importance to the Roman republic, which in its turn moulded the notions and habits of its citizens to a surprizing and formidable perseverance* in the same system. The brilliancy of success with which that system operated on the vast theatre of the world, has attracted the applause which the bulk of mankind too willingly bestow on the triumphs of conquest, however ill they may accord with the principles of justice: The tremendous hostility of the Roman arms was generally unprovoked by aggression, and frequently attended by rapacious and tyrannous insolence; and independently of the disgust which these vices must excite in the mind of the philosophical politician, he will view the narrow and improvident domestic policy of the all-victorious commonwealth with a contempt which cannot be dazzled by the splendour of its most unsullied atchievements. The Romans were indeed enabled to subsist by the spoils of conquest, while the uncorrupted science and spirit of their military character secured them the superiority in the conflicts of the field; but their notorious and avowed disregard of

* 'Rome etoit faite pour s'aggrandir, & ses loix etoient 'admirables pour cela. Aussi dans quelque gouvernement 'qu'elle ait ete sous le pouvoir des rois, dans l'aristocratie, 'ou dans l'etat populaire, elle n'a jamais cesse de faire des 'entreprises qui demandoient de la conduite, & y a reussi. Elle 'ne s'est pas trouvee plus sage que tous les autres etats de la 'terre en un jour, mais continuellement: elle a soutenu une 'petite, une mediocre, une grande fortune avec la meme su'periorite; & n'a point eu de prosperites dont elle n'ait pro'fite, ni de malheurs dont elle ne se soit servi.' Grand et Dec. des Rom. c. 9, p. 109.

every pursuit* but that of arms, threw a strong shade of wilful ignorance over the lustre of their warlike exploits; nor when the energies of the republic were effaced by the magnificence of the empire, and satiated conquest afforded time for speculation, did the Roman government listen to the suggestions of national prudence: with a disgraceful anxiety the dominating power of the universe depended for subsistence on the tributary harvests of Africa, and the granaries of Egypt were emptied for the idle and licentious populace of Rome.

Such are the striking lessons imparted by the free pencil and the vivid colours of history: let them be contemplated not less for instruction than amusement; and let that nation justly deem itself respectable which is enabled by commerce to increase its wealth, and by courage to protect its honour; which is at once enterprising and generous abroad, and the free structure of whose government facilitates every improvement at home.†

* Trade, both foreign and domestic, together with philosophy and the arts, were despised and prohibited by the austere bigotry of the republican manners. Fabricius, when at the table of Pyrrhus, expressed a wish that the peaceful doctrines of Cyneas, the Epicurean philosopher, who was present, might enervate all the *enemies* of Rome; and the elder Cato is known to have advised the expulsion of a celebrated sophist from the city, that he might no corrupt the robust character of the Roman youth, by teaching them the ingenious art of disputation.

† Why should we be deterred from applying this character to our own country, by the querulous and fastidious reproaches of national pride? The philosophic and impartial Montesquieu has led the way; and another foreign writer of considerable estimation thus describes the community of which we are members:—

'That illustrious nation distinguishes itself in a glorious 'manner by its application to every thing that can render the 'state the most flourishing. An admirable constitution 'there places every citizen in a situation that enables him to

Next to a conviction of the moral and political importance of domestic trade, the best means of improving it should employ our attention. There is certainly no department of public service more useful than the patronage of mechanical ingenuity, by whose inventions and improvements the necessity for animal labour* is diminished, and the accomplish-

' contribute to this great end, and every where diffuse a spir-
' it of true patriotism, which is zealously employed for the
' public welfare. We see there, mere citizens form consid-
' erable enterprises in order to promote the glory and welfare
' of the nation; and while a bad prince would be abridged
' of his power, a king endowed with wisdom and modera-
' tion finds the most powerful succours to give success to his
' great designs. The nobles and the representatives of the
' people form a band of confidence between the monarch and
' the nation; concur with him in every thing that concerns
' the public welfare; ease him in part of the burden of gov-
' ernment; confirm his power; and render him an obedience
' the more perfect, as it is voluntary; every good citizen sees
' that the strength of the state is really the welfare of all and
' not that of a single person.' Vattel Law Nat. b. 1. c. 2. § 24.

*No prejudice can be more absurd and mischievous than that which has frequently objected to improvement in mechanism, on the ground of their tendency to abridge the employment of the laborious part of society. Among the principal advantages resulting from the civil association of mankind, we may surely class the opportunity afforded to individuals, of dedicating their talents to the benefit of the public, and the power of the latter to bestow adequate remuneration for the time and the ability which are so employed.

In return for such disbursements from the common stock, the personal convenience and profit of every member of the community are more than proportionably increased.

A solicitude to reduce animal labour within moderate and reasonable limits, is not merely to be recommended on the score of political economy, but as one of the most amiable features of civilization: multitudes of our fellow creatures are thereby rescued from the deplorable ignorance that generally accompanies the lot of manual drudgery, and being thus advanced a rank higher in the species, may become eligible for many employments in which the understanding has a share, and which so greatly abound in a civilized and wealthy country.

ment of those great and beneficial works, by the assistance of which the natural and manufactured productions of a country are conveyed with facility and cheapness to all its parts.

Among the most powerful means by which these important objects have been promoted, we may rank the use of STEAM, and the increase of INLAND NAVIGATION. The discovery of the wonderful powers and utility of condensed vapour is of a modern date, but would have been worthy of producing the traditional boast* of Archimedes. The variety of purposes† to which the agency of these powers is applied in this country, together with the many specimens of machinery by which our different mechanical operations are facilitated, shew to what perfection the improvement of trade and manufactures may be advanced under the auspices of a free government, and an active commercial spirit.

The importance of inland navigation cannot be too strongly asserted: Nature has greatly assisted the internal trade of some countries by abundance of rivers; and it is a just tribute to the enterprising genius of man, to admire the extent to which that advantage has been increased or supplied by the means of navigable canals.‡ Many of these stupen-

*That with a fulcrum for his engines he would be able to move the world.

†The use of steam engines is now adopted in most works of magnitude, such as breweries, foundries, collieries, &c. Much praise is due to 'Messrs. Boulton and Watt,' of Birmingham, for their liberal, indefatigable, and successful endeavours to render the discovery beneficial to the public.

‡Smith's Wealth of Nations, vol. I. p. 28. 228. 9.—A writer who has given much attention to the subject, thus observes on the utility of canals: 'All canals may be considered as 'roads of a certain kind, on which one horse will draw as 'much as thirty horses do on the ordinary turnpike roads, 'or on which one man alone will transport as many goods

dous monuments of human sagacity and perseverance have distinguished the most enlightened and opulent countries of the ancient world. The Egyptians, who were justly renowned for science and the arts, completed the character of high civilization by an assiduous attention to their internal trade,* and the intercourse necessary to conduct it was facilitated by the same canals, which were constructed by the provident labour of that once free and polished people, to distribute the capricious bounty of the Nile.

The large territory and immense population of China have always rendered domestic trade an object of peculiar importance to that venerable empire: its whole surface is intersected by navigable canals,†

'as three men and eighteen horses usually do on common 'roads. The public would be great gainers were they to lay 'out upon the making of every mile a canal twenty times 'as much as they expend upon making a mile of turnpike 'road; but a mile of canal may often be made at a less expence than a mile of turnpike, consequently there is a great 'inducement to multiply the number of canals.' Phillips' Hist. Inland Navig. pref. p. 9.

* A fragment by Gray, in which philosophy and poetry are exquisitely blended, has the following descriptive lines:

'What wonder, in the sultry climes, that spread,
'Where Nile redundant o'er his summer bed
'From his broad bosom life and verdure flings,
'And broods o'er Egypt with his wat'ry wings,
'If with adventr'ous oar and ready sail
'The dusky people drive before the gale;
'Or on frail boats to neighb'ring cities ride,
'That rise and glitter o'er the ambient tide.'

See Mason's edition of Gray's works, 4to. p. 199. When the taste, genius, and erudition of Gray are considered, it must be sincerely regretted that he did not complete a poem on a plan so excellent and original. The chasm has been coarsely supplied by Mr. Knight's poem on 'the progress of Civil Society,' 4to. published 1797.

† One called the 'Great Canal,' is thus described by Mr. Phillips, in his 'History of Inland Navigation,' p. 8, 9:

which are constantly employed in the conveyance of produce and merchandize between its various towns and provinces. The tenacious formality of the Chinese character, and a very partial commerce with European nations, have militated against the introduction of modern improvements in the sciences into China; it is however admitted, that from an immemorial period of time, the first principles of the arts have been known in that country; nor can we hesitate to ascribe the remarkable industry and highly civilized manners of its people, to the multifarious employments and perpetual intercourse created by a home trade, unexampled in magnitude* of consumption.

The utility of navigable canals has not escaped the attention of European countries. By the assist-

'The Great Canal, which is also called the Royal Canal, 'is one of the wonders of art: it was finished about the year '980; thirty thousand men of all denominations were em-'ployed forty-three years in completing it. It runs from 'north to south, extending from the city of Canton to the 'extremity of the empire; and by it all kinds of foreign 'merchandize, entered at that city, are conveyed directly to 'Pekin, being a distance of 825 miles. Its breadth is about 'fifty feet, and its depth a fathom and a half, which are sufficient to carry barks of considerable burthen, which are 'managed by mast and sails, as well as by oars; and some 'of a smaller sort are towed by hand. This Canal passes 'through, or near, forty-one large cities; it has seventy-five 'vast sluices to keep up the water, and pass the barks and 'ships where the ground will not admit of sufficient depth of 'channel, besides several thousands of draw and other 'bridges.'

*It is observed by a celebrated writer, that, 'the home 'market of China is perhaps, in extent, not much inferior to 'the market of all the different countries of Europe put together.' Wealth of Nations, vol. 3. p. 32.

ance of this species of navigation, Holland* has long been enabled to combine, in an eminent degree, the advantages of external and inland trade. Russia,† Sweden,‡, Denmark,§ and France,‖ have also made

* 'The slow canals, the yellow-blossom'd vales,
'The willow tufted banks, the gliding sails,
'The crowded mart, the cultivated plain,'—
These were among the features noticed by the descriptive pen of Goldsmith (*Traveller,*) but the scene is now miserably changed; the acrimonious violence of faction has degraded the character, subverted the independence, and annihilated the commerce of Holland.

† The largest of the Russian canals is that of 'Vishnei-Voloshok.' It was projected and finished in the time of Peter the Great, and effects a communication between the Caspian and the Baltic seas. See Phillips' Hist. Inland Navigation, p. 26.

The same writer, observing on the great opportunities for inland navigation in Russia, states, that in that empire it is 'possible to convey goods by water *four thousand four hundred and seventy-two miles*, from the frontiers of China to 'Petersburg, with an interruption of only about sixty miles; 'and from Astracan to the same capital, (by the canal of 'Vishnei-Voloshok,) through a space of *one thousand four 'hundred and thirty-four miles*; a most astonishing tract of 'inland navigation, almost equal to one fourth of the circumference of the earth.' P 26.

‡ In canal experiments Sweden has been less fortunate than its former rival. There remain the ruins of some very costly but abortive works, patronized by Charles the XII during the lucid intervals of his military madness.

§ The canal of 'Kiel,' in the duchy of Holstein, does great credit to the sagacity of the Danish government. This canal was projected to enable vessels, 'not exceeding one hundred 'and twenty tons, or not drawing above ten feet water, to 'pass immediately from the Baltic into the German Ocean, 'and proceed without unloading to Hamburg; or sail to 'Holland, England, or other parts, which in times of war 'receives supplies from Denmark.' Phillips' Hist. Inland Navigation, p. 46.

‖ Of the various canals of France, that of Languedoc is the most remarkable: it was begun and completed by M. Riquet,

prodigious exertions to effect such artificial communications.

The beneficial consequences with which, for the most part, those endeavours have been attended, evince that there is scarcely any form of government, however depressing in some of its tendencies, under which domestic trade, after a certain degree of encouragement, will not rear its head and flourish.

This must be a gratifying reflection to the mind that is accustomed to contemplate, with benevolent curiosity, every step that leads to the comfort and civilization of our species; such a mind will therefore experience peculiar satisfaction in viewing the velocity of the success that generally follows the spirited commercial enterprises even of individuals when favoured by the genius of free political institutions, and protected by the solicitude of numerous and equitable laws.

The present state of the inland navigation of our own country forcibly illustrates the preceding remark: notwithstanding the great increase of home trade, and the example of the means adopted by other countries to facilitate internal commerce, England, till within these fifty years, had neglected to improve the natural advantages of many rivers, by the construction of navigable canals.

The first navigable canal in this country was begun by a nobleman,* whose various plans for the

a celebrated engineer, in the time of Louis XIVth, and would alone be sufficient to immortalize the reign of that monarch. For a circumstantial account of this truly magnificent, scientific, and useful work, see Phillips' Hist. Inland Navigation, p. 53—56.

* The DUKE OF BRIDGWATER, who in the year 1759 obtained an act of Parliament, enabling him to make a navigable canal from Worsley to Salford. For a particular and interesting account of the progress and completion of this ca-

improvement of our inland navigation have been crowned with signal and deserved success.

This respectable and spirited example has had its proper influence, by stimulating the plans and the completion of similar undertakings. The number of navigable canals already constructed, and those which are in contemplation to be made in various parts of the kingdom, demonstrate at once the public utility, and the private advantages of this species of property; shares in which are now become of such consequence, as to form very frequent funds for provisions in family settlements.

Thus greatly has Britain, within the compass of half a century, improved her inland navigation; and all who feel interested in the prosperity of our country will be happy in perceiving, that while good faith,

al, see Phillips' Hist. Inland Navig. c. 7. where the utility of the undertaking is thus described:—

'Before the Duke began his canal, the price of water carriage by the old navigation on the river Mersey and Irwell, 'from Liverpool to Manchester, was twelve shillings the 'ton, and from Warrington to Manchester, ten shillings the 'ton. Land carriage was forty shillings the ton, and not 'less than two thousand tons were yearly carried on an aver- 'age. Coals at Manchester were retailed to the poor at 'seven-pence per hundred weight, and often dearer. The 'duke, by his navigation from Liverpool to Manchester, car- 'ries for only six shillings a ton, and in as short a time, and 'with as certain delivery, as if by land carriage, because he is 'able, at the lowest neap tides, to come into or go out of his 'canal at Runcorn Gap to Liverpool which he could not do 'if he had gone in at the Hempstones, as was at first inten- 'ded; consequently one half is saved to the public of the old 'water carriage, and almost six parts in seven of the land 'carriage. Coals are also delivered at Manchester, seven 'score the hundred weight, for three-pence half penny.'

'In the projection and execution of this and similar works, the duke was assisted by the late Mr. Brindley, a self taught engineer of uncommon abilities. Particulars of the life of that extraordinary man are recorded in the *Biographia Britannica*, vol. 2.

enterprising industry, and superior manufactures have placed it at the head of commercial nations, its internal trade is rapidly advancing to the utmost improvement of which it is apparently susceptible*.

The transactions which form the intercourse of an extensive domestic trade, and the various confidential occurrences which attend the increased relations of a civil community, obviously require for their definition and protection a multiplying series of legislative provisions. The aptitude of such legal regulations peculiarly demands the care of those to whom the higher concerns of the state are entrusted; for if that vigilance were not exercised, it would be in vain that a country might labour for its own prosperity. In proportion also as laws become necessarily more numerous, it should be recollected, that precision is their greatest ornament; other productions of the human genius may be allowed to derive

* In a valuable work lately given to the public by a respectable and intelligent magistrate, it is observed, that in this country there has been 'an accumulation of not less than two 'thirds in commerce, as well as manufactures.' Treatise on the Police of the Metropolis, 4th edit. p. 409.

The same work gives the following estimation of the annual commerce of the metropolis alone: 'Above 13,500 vessels including their repeated voyages, arrive at and depart 'from, the port of *London* with merchandize, in the course 'of a year; besides a vast number of river craft employed in 'the trade of the interior country, bringing and carrying away property estimated at *seventy millions sterling*.

'In addition to this, it is calculated that above 40,000 waggons and other carriages, including their repeated journies, 'arrive and depart laden, in both instances, with articles of 'domestic, colonial, and foreign merchandize; occasioning 'a transmit of, perhaps, (when cattle and provisions sent for 'the consumption of the inhabitants are included,) *fifty millions more*.' P. 410, 11.

Dr. Aikin, in his history of Manchester (4to 1797.) remarks the interesting progress of manufactures and trade, and the concomitant habits of their respective stages, with a precision and philosophy not inferior to the pen of Smith.

their charms from the beauty of metaphor and the grandeur of general expression, but the utility and the praise of a municipal code will depend on the dry simplicity and scrupulous detail with which it is adapted to the purposes of public security and social confidence.

When we contemplate the slow progress by which nations, civilized in many other respects, have arrived at a moderate degree of perfection in the legislative science, our wonder is excited, that the very first purposes of benefit for which the species can be supposed to associate should be postponed to the latest consideration.

Philosophy would be idly occupied in attempting to develope, by hypothesis and conjecture, the cause of this inversion in the pursuits of society; but concerning the spirit and the tendency of the positive institutions which have prevailed in celebrated states, disquisition may be profitably employed, and on this topic history presents abundance of materials to excite the vivacity of speculation, and recompence the labour of research.*

Among the consequences of the great and rapid vicissitudes which have frequently befallen the gran-

* The profound researches of Montesquieu, illuminated by a genius powerful and vivid, have explored the principles of a science the most important to the happiness of mankind.—With some exception to the predominating tenet of the influence of climate, the "Esprit des Loix" displays a fulness of learning, philosophy, and political sagacity, before which the superficial effusions of Voltaire, and even the ardent reveries of Rousseau, sink into insignificance. It is however to be lamented that their countrymen have not taken the benefit of such a comparison, and that, in the progress of the mighty revolution that still astonishes Europe, the dogmas of Rousseau, Voltaire, and an imitative herd of declaimers on the science of government have been adopted, in preference to the practical, sober, and wise lessons of the immortal Montesquieu.

deur of nations, none is more deeply to be regretted than the subversion of those systems of internal polity which have resulted from mature civilization, together with that of the political importance of the countries where they have existed. This abuse of conquest is often productive of a slothful and morbid degeneracy* of the human intellect, by destroying the institutions which are calculated to excite and perfect its finer exertions: the fire of national genius has indeed sometimes revived by the energy of a few remaining sparks, and, after ages of dreary ignorance, has poured a sudden lustre on the clouded regions of art and literature. This, however, is but a small recompence for the irretrievable loss of exemplary institutions, much more essential to the happiness of society: the mandate of Omar, that consigned the Alexandrian library to the flames, was infinitely less injurious to the improvement of mankind, than the destruction of the remains of the admirable polity which Egypt† had exhibited in its days of splendour, and from which accomplished Athens derived its infant rudiments of civilization.

The fragments that remain of the legal institutions of Athens have been chiefly preserved in the harangues of the orators. From the frivolous and unjust grounds of accusation, the indecent violence and capricious cruelty which history has imputed to most

* 'Ut corpora lente augescunt, cito extinguuntur, sic ingenia studiaque oppresseris facilius, quam revocaveris. Subit quippe etiam ipsius inertiæ dulcedo: et invisa primo desidia postremo amatur.' Tacitus in vit. Agric.

† See Diodorus Siculus, lib. 1. Lord Kaims' Historical Law-Tracts, p. 77 (note;) and Drummond's Review of the Governments of Sparta and Athens, p. 35. It is a subject of regret that a proper history of Egypt still remains among the *desiderata* of literature.

of their state prosecutions,* the criminal jurisprudence of the Athenians appears to have been grossly defective. In adjusting the rights of property,† and in the cognizance of ordinary transactions, the decisions of their tribunals were doubtless marked by a more respectable character.

The flourishing state of commerce and the arts among the Athenians, and the volatile temper of that celebrated people, were calculated to encourage forensic litigation;‡ and under the mild and auspicious genius of Solon, their municipal laws imbibed the spirit of order and discriminating equity. Unfortunately Athens did not enjoy the uninterrupted benefit of the wise regulations of her illustrious legislator; They were, indeed, treated with apparent respect, but lost their salutary energy in the turbulent commotions of civil discord, which prepared the downfal of the Athenian republic.

The singular constitution and legal regimen of

* See Mitford's Hist. Greece, vol. 5. c. 22. This writer is entitled to a high rank among historians: unseduced by the blandishments of fable, and superior to the influence of classical prejudices, he has investigated the policy and characters of the Grecian states with an acuteness of penetration, and a solidity of judgment, adapted to the true purposes of history

† Dr. Adam Smith observes (Wealth of Nations, vol. 8, p. 179,) that, 'law never seems to have grown up to be a science in any republic of ancient Greece.' This remark is certainly too general; for the speeches of *Isæus* on the laws of succession to property at Athens display much logical subtility of argument, many appeals to former decisions, and great nicety in the choice and arrangement of evidence. A translation of this legal orator, with a copious and learned commentary, was given to the public (4to 1779) from the masterly hand of Sir William Jones.

‡ In Sir William Jones' prefatory discourse to the speeches of Isæus (p. xviii—xxxiii) see a curious and analogical account of the progress of an Athenian law-suit.

tine court: it may now be viewed with a mixture of pity and disdain. while the ingenious discriminations, and correct reasoning of the Roman jurists, are occasionally permitted to impart their light and authority to the decisions of our municipal tribunals.

Of those decisions the Law of Contracts as applied to commercial transactions, now embraces the most considerable part: the laws that regulate the descent and the transfer of real property are the early specimens of stability and civilization in a government: when refinement advances and wants multiply, invention and labour, ductile to every form suggested by the convenience of man, creates new species of wealth,* which circulates with almost a magical rapidity through the various channels of foreign and domestic trade.

The bold outlines of the Law of Nations have been found competent to regulate the general transactions of external commerce; but that which exists within a state, requires, in proportion to its extent and encouragement, a far more positive and minute system of jurisprudence. To provide for the various cir-

* Among the many important avocations of literature, it would be surprising if some disquisition had not been employed on the sources of national opulence. On this subject the speculations most worthy of notice have originated with the moderns, and among these the French writers are decidedly superior in the novelty and the ingenuity, if not for the practicability of their doctrines. The tenets of the celebrated sect of *Economists* are faithfully represented by Dr. Adam Smith (Wealth of Nations. b. 4. c. 9.) The facts and reasonings contained in that very respectable work have procured a just applause to the diligence, the acuteness, and philosophical talents of the author, but might, without injury to his reputation. have been more artlessly given to the public. Like the speculatists alluded to, he has clothed with the formality of system an inquiry, in the scope of which, doubtless, many important principles remain to be investigated, and has thereby contributed to found in this country a school of dogmatists in the yet very imperfect science of political economy.

cumstances which affect the deposit and the transmission of moveable property—to discriminate the shades of identity which belong to fraud, negligence, or accident, is what only a well digested system of laws can teach, and what none but a people emulous of civil improvement will be disposed to learn.

By shis scale we ought to estimate the value of such a body of reason as THE ROMAN CIVIL LAW, and to measure our regret that the victorious barbarians of the north, while they triumphed over the military degeneracy, did not respect the legal wisdom of vanquished Rome: but it is the prerogative of conquest to palsy the improvement of mankind—the enlightened and systematic jurisprudence of the Civilians was supplanted by numerous codes, whose uncouth and monstrous features betrayed their savage origin: the civilized world seemed to relapse into worse than primæval barbarity, and Europe exhibited for many ages a scene of ignorance, disorder, and rapine, which it grieves the philosopher to review, and fatigues the historian to describe.

From this barbarous chaos of laws sprung the feudal system, which had comparitive merit in the gradation of its parts, and the compactness of its form, but which was equally repugnant to the progress of commercial industry, and civil order. The proud chieftains who, for stipulated advantages, conducted their obsequious vassals to the field, and who employed the intervals from foreign war in the tumults of intestine discord, the lawless violence of territorial robbery, or the coarse debaucheries of the castle;—these and their idle retainers were not less hostile to commerce and refinement than the Huns, the Goths, and other barbarians, who, at different periods, poured their desolating swarms over the most fertile and civilized provinces of Europe.

ENGLAND, notwithstanding a geographical seclusion, classically proverbial,* experienced the ravages of various invasions, from the doubtful conquest of Cæsar, to the permanent ascendancy of the Norman arms, laws, and manners.

Our Saxon ancestors, who, after their unjust expulsion of the ancient Britons, settled themselves in the fairest possessions of this island, were disposed to improve, by the arts of peace, the territory they had acquired by the violence of war, and retained the free spirit, while they gradually lost the ferocious character of the German tribes, whose manners and institutions are so expressly delineated by the pen of Tacitus.†

By the wisdom and the patriotism of Alfred the Great, the Saxon customs were improved into a system of policy, the remains of hich display the just pretensions of that amiable monarch to the grateful memory of Englishmen The institutions of Alfred were impregnated with those genuine principles of legislation which assist and expand with the progressive improvements of a state, and a subsequent age might have seen the free model of the Anglo-Saxon jurisprudence, adorned with the cultivated reason of the civil law. It was however the fate of our country, that its political liberties should be surrendered to the shackles of the feudal system, that the possessions of its inhabitants should become a prey to the rapacity of foreign mercenaries, and that the barbarous pomp of military pride should oppress, and spurn, the efforts and the blessings of industry and peace.

The sanguinary violence which often attends the heat of conquest may be deplored, but its deliberate and more lasting injuries are inflicted on the laws of

* 'Et penitus toto divisos orbe Britannos.' VIRG, Ec. 1.

† 'De Mor. Germ.'

a vanquished people: the simple and equitable principles of jurisprudence which were ripening to perfection among our Saxon progenitors, were soon perplexed by the subtilities, and vitiated by the chicane, of the Norman lawyers:* corruption and partiality began to disgrace the tribunals of Britain; and while the conqueror affected to reign in the name of the law,† himself and his followers placed their visible dependance on the power of the sword.‡

These were the severest and most humiliating marks of the subjugation of our country by the victorious Normans. The feudal laws which they introduced, and the inauspicious fluctuations of an unsettled government, restrained for many centuries the progress of British commerce and manufactures: these obstructions were at length removed, and the first signal for the commercial prosperity and civil stability of this kingdom was the abolition of the feu-

* 'Legibus tantum et moribus Normannicis omnia subsellia strepebant.' CRAGII Jus Feudale, 1. 1.

† Sir Matthew Hale (Hist. Com. Law. c. 5.) and Sir William Blackstone (Com. vol. 2. p 48—52.) have laboured to prove that the conquest of England by William the First, is not to be understood in the military sense of the term, but as synonymous with legal acquisition or purchase. This construction has derived a feeble support from the equivocal use of the word *conquestus*, the vague pretensions of title to the crown on the part of the Norman duke, and his affected solicitude to restore the Saxon institutions; but it is clearly repugnant to the plain facts of that period of our history. See Hume's Hist. vol. I. p. 282—284.

‡ At the distance of more than two centuries from the Norman conquest, and in the reign of a prince (Edward I.) whose improvement of our law has procured him the appellation of the English Justinian, this *iron* evidence of title was produced by the celebrated Earl Warrenne, and with a *prudent* acquiescence on the part of the monarch. Hume's Hist. vol. 2 p. 238—A similar *explanation* was given to Robert Bruce, King of Scotland, by some of his nobles: See Robertson's Hist. Scot. vol. 1. p. 48.

dal tenures.* Some exceptionable features of that system are undoubtedly yet visible in the abstruser parts of our jurisprudence; but the wisdom of gradual reform is preferable to the rage of extirpation, and it was perhaps impracticable to extract, without violence, every fibre of a root that had struck so deeply, and spread so widely in the soil of Britain.

The event† by which our constitution was settled, and our civil rights properly defined and secured, is to be regarded as another and still more important æra in the history of our commerce: since that memorable period, a vast and increasing accession of external and internal trade has demanded the solicitude of the legislature, and amplified the jurisdiction of our legal tribunals The various laws which have taken every species of commercial property under protection: the luminous arguments and solemn decisions by which the sense and spirit of those laws have been applied to the transactions of men, form a syteu of jurisprudence that we cannot contemplate without gratitude, and respect. It must also be recollected that, as the benefit of the law is felt in its administration, great encomium is due to the wisdom and integrity of the judge: he is the living organ of the law, and on his intelligent and upright interpretation of its precepts much of the welfare of the community depends: there is, consequently, no department of science in which excellence more deserves to be applauded; and such names as Holt, Hardwicke and Mansfield, will continue to be illustrious, while the able and impartial distribution of justice shall be thought an honour to the tribunals of a nation.

In an age that has so peculiarly witnessed the pompous, but futile and disastrous pretensions of

* 12th of Charles the Second, chap. 24.

† Accession of William the Third.

speculative policy, Englishmen need not be exhorted duly to estimate laws which include the soundest maxims of moral experience, and the juridical talents and probity that secure the efficacy of their application to the concerns of life.

AN

ESSAY

ON THE

LAW OF BAILMENTS.

HAVING lately had occaſion to examine with ſome attention, the nature and properties of that contract, which lawyers call Bailment, or, *A delivery of goods on a condition, expreſſed or implied, that they ſhall be reſtored by the bailee to the bailor, or according to his directions, as ſoon as the purpoſe for which they were bailed, ſhall be anſwered*, I could not but obſerve with ſurpriſe, that a title in our Engliſh law which ſeems the moſt generally intereſting ſhould be the leaſt generally underſtood, and the leaſt preciſely aſcertained. Hundreds and thouſands of men paſs through life, without knowing, or caring to know, any of the numberleſs niceties, which attend our abſtruſe, though elegant, ſyſtem of real property, and without being at all acquainted with that exquiſite logic, on which our rules of ſpecial pleading are founded; but there is hardly a man of any

age or ſtation, who does not every week and almoſt every day contract the obligations or acquire the rights of a *hirer* or a *letter to hire*, of a *borrower* or a *lender*, of a *depoſitary* or a perſon *depoſiting*, of a *commiſſioner* or an *employer*, of a *receiver* or a *giver*, in *pledge*; and what can be more abſurd, as well as more dangerous, than frequently to be bound by duties without knowing the nature or extent of them, and to enjoy rights, of which we have no juſt idea? Nor muſt it ever be forgotten, that the contracts above-mentioned are among the principal ſprings and wheels of civil ſociety; that, if a want of mutual confidence, or any other cauſe, were to weaken them or obſtruct their motion, the whole machine would inſtantly be diſordered or broken to pieces; preſerve them, and various accidents may ſtill deprive men of happineſs; but deſtroy them, and the whole ſpecies muſt infallibly be miſerable. It ſeems, therefore, aſtoniſhing that ſo important a branch of juriſprudence ſhould have been ſo long and ſo ſtrangely unſettled in a great commercial country; and that, from the reign of Elizabeth to the reign of Anne, *the doctrine of bailments* ſhould have produced more contradictions and confuſion, more diverſity of opinion and inconſiſtency of argument, than any other part, perhaps,

of juridical learning; at leaſt, than any other part equally ſimple.

Such being the caſe, I could not help imagining that a ſhort and perſpicuous diſcuſſion of this title, an expoſition of all our ancient and modern deciſions concerning it, an attempt to reconcile judgments apparently diſcordant, and to illuſtrate our laws by a compariſon of them with thoſe of other nations, together with an inveſtigation of their true ſpirit and reaſon, would not be wholly unacceptable to the ſtudent of Engliſh law; eſpecially as our excellent Blackſtone, who of all men was beſt able to throw the cleareſt light on this, as on every other ſubject, has compriſed the whole doctrine in three paragraphs, which, without affecting the merit of his incomparable work, we may ſafely pronounce the leaſt ſatisfactory part of it, for he repreſents *lending* and *letting to hire*, which are *bailments* by his own definition, as contracts of *a diſtinct ſpecies*; he ſays nothing of employment by *commiſſion*; he introduces the doctrine of a *diſtreſs*, which has an analogy to a *pawn*, but is not properly *bailed*; and on the great queſtion of *reſponſibility for neglect*, he ſpeaks ſo looſely and indeterminately, that no fixed

ideas can be collected from his words.*—His commentaries are the most correct and beautiful outline that ever was exhibited of any human science; but they alone will no more form a lawyer, than a general map of the world, how accurately and elegantly soever it may be delineated, will make a geographer: if, indeed, all the titles, which he professed only to sketch in elementary discourses, were filled up with exactness and perspicuity, Englishmen might hope, at length, to possess a digest of their laws, which would leave but little room for controversy, except in cases depending on their particular circumstances; a work which every lover of humanity and peace must anxiously wish to see accomplished. The following Essay (for it aspires to no higher name) will explain my idea of supplying the omissions, whether designed or involuntary in the Commentaries on the Laws of England.

Subject proposed. I propose to begin with treating the subject *analytically*, and, having traced every part of it up to the first principles of natural reason, shall proceed, *histor-*

* 2 Comm. 452, 453, 454. (1)

(1) See Christian's Edit. Black. Com. vol 2 p. 453, note (11,) where the learned commentator's inaccuracy on the subject is also admitted, and where a just encomium is given to the elegance, the liberal learning, and the sound law of this Essay.

ically, to ſhow with what perfect harmony thoſe principles are recogniſed and eſtabliſhed by other nations, eſpecially the Romans, as well as by our Engliſh courts, when their decifions are properly underſtood and clearly diſtinguiſhed; after which I ſhall reſume *ſynthetically* the whole learning of *bailments*, and expound ſuch rules as, in my humble apprehenſion, will prevent any farther perplexity on this intereſting title, except in caſes very peculiarly circumſtanced.

From the obligation, contained in the definition of bailment, *to reſtore the thing bailed at a certain time*, it follows that the bailee muſt *keep* it, and be *reſponſible* to the bailor *if it be loſt or damaged:* but, as the bounds of juſtice would, in moſt caſes, be transgreſſed, if he were made anſwerable for the loſs of it *without his fault*, he can only be obliged to keep it with a degree of *care proportioned to the nature of the bailment;* and the inveſtigation of this *degree* in every particular contract is the problem, which involves the principal difficulty. I. Analysis.

There are infinite ſhades of *care* or *dili-* ... from the ſlighteſt momentary thought, ... tranſient glances of attention, to the moſt ... lant anxiety and ſolicitude; but *ex-* ...*ies* in this caſe, as in moſt others, *are in-* ...*pplicable to practice:* the firſt extreme

would ſeldom enable the bailee to perform the condition, and the ſecond ought not in juſtice to be demanded; ſince it would be harſh and abſurd to exact the ſame anxious care, which the greateſt miſer takes of his treaſure, from every man who borrows a book or a ſeal. The degrees then of care, for which we are ſeeking, muſt lie ſomewhere between theſe extremes; and, by obſerving the different manners and characters of men, we may find a certain ſtandard, which will greatly facilitate our inquiry; for, although ſome are exceſſively careleſs, and others exceſſively vigilant, and ſome through life, others only at particular times, yet we may perceive, that *the generality of rational men* uſe nearly the ſame degree of diligence in the conduct of *their own* affairs; and this care, therefore, which *every perſon of common prudence and capable of governing a family* takes of *his own* concerns, is a proper meaſure of that which would uniformly be required in performing every contract, if there were not ſtrong reaſons for *exacting* in ſome of them a *greater*, and *permitting* in others a *leſs*, degree of attention. Here then we may fix a conſtant determinate point, on each ſide of which there is a ſeries conſiſting of variable terms tending indefinitely towards the above-mentioned extremes, in proportion as the caſe ad-

mits of indulgence or demands rigour: if the conſtruction be *favourable*, a degree of care *leſs* than the ſtandard will be ſufficient; if *rigorous*, a degree *more* will be required; and, in the firſt caſe, the meaſure will be that care which *every man of common ſenſe, though abſent and inattentive*, applies to his own affairs; in the ſecond, the meaſure will be that attention which a man *remarkably exact and thoughtful* gives to the ſecuring of his perſonal property.

The fixed mode or ſtandard of diligence I ſhall (for want of an apter epithet) invariably call ORDINARY; although that word is equivocal, and ſometimes involves a notion of degradation, which I mean wholly to exclude; but the unvaried uſe of the word in one ſenſe will prevent the leaſt obſcurity. The degrees on each ſide of the ſtandard, being indeterminate, need not be diſtinguiſhed by any preciſe denomination: the firſt may be called LESS, and the ſecond MORE, THAN ORDINARY diligence.

Superlatives are exactly true in mathematics; they approach to truth in abſtract morality; but in practice and actual life they are commonly falſe: they are often, indeed, uſed for mere *intenſives*, as *the* MOST *diligent* for *VERY diligent*; (2) but this is a rhetorical figure; and as Rhetoric, like her ſiſ-

(2) See Vinnius in Inſtit. lib. 3 tit. 15.

ter Poetry, delights in fiction, her language ought never to be adopted in ſober inveſtigations of truth: for this reaſon I would reject from the preſent inquiry, all ſuch expreſſions as *the utmoſt care*, *all poſſible* or *all imaginable diligence*, and the like, which have been the cauſe of many errors in the code of ancient Rome, whence, as it will ſoon be demonſtrated, they have been introduced into our books even of high authority.

Juſt in the ſame manner, there are infinite ſhades of *default* or *neglect*, from the ſlighteſt inattention or momentary abſence of mind, to the moſt reprehenſible ſupineneſs and ſtupidity: theſe are the omiſſions of the before-mentioned degrees of diligence and are exactly correſpondent with them. Thus the omiſſion of that care, *which every prudent man takes of his own property*, is the determinate point of negligence, on each ſide of which is a ſeries of variable modes of default infinitely diminiſhing, in proportion as their oppoſite modes of care infinitely increaſe; for the want of extremely great care is an extremely little fault, and the want of the ſlighteſt attention is ſo conſiderable a fault, that it almoſt changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of truſt, and a deviation from common honeſty. This

known, or fixed, point of negligence is therefore a mean between *fraud* and *accident*; and, as the increaſing ſeries continually approaches to the firſt extreme, without ever becoming preciſely equal to it, until the laſt term melts into it or vaniſhes, ſo the decreaſing ſeries continually approximates to the ſecond extreme, and at length becomes nearer to it than any aſſignable difference: but the laſt terms being, as before, excluded, we muſt look within them for modes applicable to practice; and theſe we ſhall find to be the omiſſions of ſuch care as *a man of common ſenſe, however inattentive*, and of ſuch as a *very cautious and vigilant* man, reſpectively take of *their own poſſeſſions*.

The conſtant, or fixed mode of *default* I likewiſe call ORDINARY, not meaning by that epithet to diminiſh the culpability of it, but wanting a more appoſite word, and intending to uſe this word uniformly in the ſame ſenſe; of the two variable modes the firſt may be called GREATER, and the ſecond LESS, THAN ORDINARY; or the firſt GROSS, and the other SLIGHT, neglect.

It is obvious that a bailee of common honeſty, if he alſo have common prudence, would not be *more* negligent *than ordinary* in keeping the thing bailed: ſuch negligence (as we before have intimated) would be a violation of good faith, and a proof of

conſtitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government; but, when a different intention is *expreſſed*, the rule (as in deviſes) yields to it; and a bailee without benefit may, by a ſpecial undertaking, make himſelf liable for *ordinary* or *ſlight* neglect, or even for inevitable *accident*:—hence, as an agreement, *that a man may ſafely be diſhoneſt*, is repugnant to decency and morality, and as no man ſhall be *preſumed* to bind himſelf againſt *irreſiſtible force*, it is a juſt rule that *every* bailee is reſponſible for *fraud*, even *though* the contrary be ſtipulated, but that *no* bailee is reſponſible for *accident*, *unleſs* it be moſt expreſsly ſo agreed.

II. The history. The plain elements of natural law, on the ſubject of reſponſibility for neglect, having been traced by this ſhort analyſis, I come to the ſecond, or *hiſtorical* part of my Eſſay; in which I ſhall demonſtrate, after a few introductory remarks, that a perfect harmony ſubſiſts on this intereſting branch of juriſprudence in the codes of nations moſt eminent for legal wiſdom, particularly of the Romans and the Engliſh.

Jewiſh and Athenian law. Of all known laws the moſt ancient and venerable are thoſe of the Jews; and among the Moſaic inſtitutions we have ſome curious rules on the ve-

ry ſubject before us; but, as they are not numerous enough to compoſe a ſyſtem, it will be ſufficient to interweave them as we go along, and explain them in their proper places; for a ſimilar reaſon, I ſhall ſay nothing here of the Attic laws on this title, but ſhall proceed at once to that nation by which the wiſdom of Athens was eclipſed, and her glory extinguiſhed.

The deciſions of the old Roman lawyers, collected and arranged in the ſixth century by the order of JUSTINIAN, have been for ages, and in ſome degree ſtill are, in bad odour among Engliſhmen; this is honeſt prejudice, and flows from a laudable ſource: but a prejudice, moſt certainly, it is, and, like all others, may be carried to a culpable exceſs. Roman law.

The conſtitution of Rome was originally excellent; but when it was *ſettled*, as hiſtorians write, *by* AUGUSTUS, or, in truer words, when that baſe diſſembler and cold-blooded aſſaſſin *C. Octavius* (3) gave law to millions of honeſter, wiſer, and braver men than himſelf by the help of a profligate army and an abandoned Senate, the new form of government was in itſelf abſurd and unnatural;

(3) Our author's antipathy to the character of Auguſtus is pointedly expreſſed in a letter to Mr. Gibbon (Gibb. Poſt. Works;) and a principal cauſe there aſſigned, namely, the opinion of Cicero, does equal honor to his ſenſibilities as a patriot and a man of genius.

and the *lex regia*, (4) which concentrated in the prince all the powers of the ſtate, both executive and legiſlative, was a tyrannous ordinance, with the name only, not the nature, of a law :* had it even been voluntarily conceded, as it was in truth forcibly extorted, it could not have bound the *ſons* of thoſe who conſented to it; for "a renunci-"ation of *perſonal* rights, eſpecially rights of "the higheſt nature, can have no operation "beyond the *perſons* of thoſe who renounce "them." (5) Yet, iniquitous and odious as the *ſettlement* of the conſtitution was, Ulpian only ſpoke in conformity to it when he ſaid that "the will of the prince had the "force of law;" that is, as he afterwards explains himſelf, *in the* Roman *empire*;

* D. 1. 4. 1.

(4) See Vinn. in Inſtit. lib. 1. tit. 2. and Gibbon's Dec. and Fall Rom. Emp. 8vo. edit. vol. 8. c. 44 & 17. 49.

(5) The unqualified adoption of this principle may ſeem to reflect on the prudence of the learned and eloquent author of the Eſſay; but though conſtitutional freedom numbered him among her warmeſt and ableſt advocates, there ſhould not be a ſuſpicion that this amiable man, and accompliſhed ſcholar, ever entertained a wiſh to encourage the turbulence of ſedition by the ſanction of his opinions. Since the time when the eſſay was written, Europe has been agitated by a ſeries of unparalleled revolutionary exploſions, ſome of which have been equally fatal to the ſafety of the prince, and that of the philoſopher: ſuch indeed, has been the recent and licentious abuſe of many expreſſions, uſed by eminent writers for the pureſt purpoſes of liberty, that Locke and Sir William Jones would, perhaps, now deem it neceſſary to guard their political doctrines from being perverted by the miſchievous conſtruction of viſionary and artful demagogues.

for he neither meaned, nor could be mad enough to mean, that the propoſition was juſt or true as a general maxim. So congenial, however, was this rule or ſentence, ill underſtood and worſe applied, to the minds of our early Norman kings, that ſome of them, according to Sir John Forteſcue, "were not pleaſed with their own "laws, but exerted themſelves to intro-"duce the civil laws of Rome into the gov-"ernment of England;"* and ſo hateful was it to our ſturdy anceſtors, that, if John of Saliſbury be credited, "they burned "and tore all ſuch books of civil and canon "law as fell into their hands:"† but this was intemperate zeal; and it would have been ſufficient to improbate the *public*, or *conſtitutional* maxims of the Roman imperial law, as abſurd in themſelves as well as inapplicable to our free government, without rejecting the whole ſyſtem of *private* juriſprudence as incapable of anſwering even the purpoſe of illuſtration. Many *poſitive* inſtitutions of the Romans are demonſtrated by Forteſcue, with great force, to be far ſurpaſſed in juſtice and ſenſe by our own immemorial cuſtoms; and the reſcripts of Severus or Caracalla,

Diſtinction between the *private* and *public*, the *rational* and *poſitive* laws of Rome

* *De* Laud. Leg. Angl. c. 33. 34.

† Seld. in Fort. c. 33.

which were laws, it ſeems, at Rome, have certainly no kind of authority at Weſtminſter; but, in queſtions of *rational* law, no cauſe can be aſſigned, why we ſhould not ſhorten our own labor by reſorting occaſionally to the wiſdom of ancient juriſts, many of whom were the moſt ingenious and ſagacious of men. What is good ſenſe in one age muſt be good ſenſe, all circumſtances remaining, in another; and pure unſophiſticated reaſon is the ſame in Italy and in England, in the mind of a Papinian and of a Blackſtone.

Without undertaking, therefore, in all inſtances, to reconcile Nerva with Proculus, Labeo with Julian, and Gaius either with Celſus or with himſelf, I ſhall proceed to exhibit a ſummary of the Roman law on the ſubject of *reſponſibility for neglect*.

Two famous laws of Ulpian.

The two great ſources, whence all the deciſions of civilians on this matter muſt be derived, are *two* laws of Ulpian; the firſt of which is taken from his work on Sabinus, and the ſecond from his tract on the Edict; of both theſe laws I ſhall give a verbal tranſlation according to my apprehenſion of their obvious meaning, and ſhall then ſtate a very learned and intereſting controverſy concerning them, with the principal arguments on each ſide, as far as they tend to elucidate the queſtion before us.

"Some contracts, says the great writer "on *Sabinus*, make the party responsible "for DECEIT ONLY; some for both DE- "CEIT AND NEGLECT. Nothing more than "*responsibility for* DECEIT *is demanded* in "DEPOSITS and POSSESSION AT WILL; "both DECEIT AND NEGLECT *are inhibit-* "*ed* in COMMISSIONS, LENDING FOR USE, "CUSTODY AFTER SALE, TAKING IN "PLEDGE, HIRING; also in PORTIONS, "GUARDIANSHIPS, VOLUNTARY WORKS: "(among these SOME *require* even *more* "*than ordinary* DILIGENCE.) PARTNERSHIP "and UNDIVIDED PROPERTY make *the part-* "*ner and joint-proprietor* answerable for both "DECEIT AND NEGLIGENCE."*

"In contracts, says the same author in "his other work, we are sometimes respon- "sible for DECEIT ALONE; sometimes "for NEGLECT ALSO; for DECEIT ONLY "in DEPOSITS; because, since NO BENE- "FIT accrues to the depositary, he can just- "ly be answerable for no more than DE- "CEIT; but if a REWARD happen to be "given, then *a responsibility for* NEGLECT

* Contractûs quidam DOLUM malum DUNTAXAT recipiunt; quidam, et DOLUM ET CULPAM. DOLUM tantûm DEPOSITUM et PRECARIUM; DOLUM ET CULPAM, MANDATUM, COMMODATUM, VENDITUM, PIGNORI ACCEPTUM, LOCATUM; item DOTIS DATIO, TUTELÆ, NEGOTIA GESTA: (in his QUIDAN et DILIGENTIAM.) SOCIETAS et RERUM COMMUNIO et DOLUM CULPAM recipit. D. 50. 17. 23.

" ALSO is required; or, if it be agreed at the " time of the contract, that the depositary " shall answer both for NEGLECT and for " ACCIDENT: but, where A BENEFIT accrues " to both parties, as in KEEPING A THING " SOLD, as in HIRING, as in PORTIONS, as in " PLEDGES, as in PARTNERSHIP, both DECEIT " AND NEGLECT make the party liable. " LENDING FOR USE, indeed, is for the most " part BENEFICIAL to the BORROWER ONLY; " and, for this reason, the better opinion is " that of Q. Mucius, who thought, that *HE* " should be responsible not only for NEG- " LECT, but even for the omission of *more* " *than ordinary* DILIGENCE "*

Critical remarks.

One would scarce have believed it possible, that there could have been two opinions on laws so perspicuous

* In contractibus interdum DOLUM SOLUM, interdum ET CULPAM, præstamus; DOLUM in DEPOSITO; nam, quia NULLA UTILITAS ejus versatur, apud quem deponitur, merito DOLUS præstatur SOLUS; nisi forte et MERCES accessit, tunc enium, ut est et constitutum, ETIAM CULPA exhibetur; aut, si hoc ab initio convenit, ut et CULPAM et PERICULUM præstet is, penes quem deponitur; sed, ubi UTRIUSQUE UTILITAS vertitur, ut in EMPTO, ut in LOCATO ut in DOTE, ut in PIGNORE ut in SOCIETATE, et DOLUS ET CULPA præstatur. COMMODATUM autem plerumque SOLAM UTILITATEM continet ejus, CUI COMMODATUR; et ideo verior est Q. MUCII sententia existimantis et CULPAM præstandam et DILIGENTIAM. D. 13. 6. 5. 2. (6)

(6) See Domat. Civ. Law, lib. 1, tit. 1, §3. and Vinn. in Justit. lib 3. tit. 15

and preciſe, compoſed by the ſame writer, who was indubitably the beſt expoſitor of his own doctrine, and apparently written in illuſtration of each other; the firſt comprising the rule, and the ſecond containing the reaſon of it: yet the ſingle paſſage extracted from the book on Sabinus has had no fewer than twelve particular commentaries in Latin,* one or two in Greek,† and ſome in the *modern* languages of Europe, beſides the general expoſitions of that important part of the digeſt, in which it is preſerved. Moſt of theſe I have peruſed with more admiration of human ſagacity and induſtry than either ſolid inſtruction or rational entertainment; for theſe authors, like the generality of commentators, treat one another very roughly on very little provocation, and have the art rather of clouding texts in themſelves clear, than of elucidating paſſages, which have any obscurity in the words or the ſenſe of them. Campanus, indeed, who was both a lawyer and a poet, has turned the firſt law of Ulpian into Latin hexameters; and his authority, both in proſe and verſe, confirms the interpretation which I have juſt given.

* Bocerus, Campanus, D'Avezan, Del Rio, Le Conte, Rittershusius, Giphanius, J. Godefroi, and others.

† The ſcholium on *Harmenopulus*, l. 6. tit. de Reg. Jur. n. 55. may be conſidered as a commentary on this law.

The chief cauſes of all this perplexity have been, firſt, the vague and indiſtinct manner in which the old Roman lawyers, even the moſt eminent have written on the ſubject; ſecondly, the looſe and equivocal ſenſe of the words *DILIGENTIA* and *CULPA*; laſtly and principally, the darkneſs of the parenthetical clauſe *IN HIS QUIDAM ET DILIGENTIAM*, which has produced more doubt, as to its true reading and ſignification, than any ſentence of equal length in any author Greek or Latin. Minute as the queſtion concerning this clauſe may ſeem, and dry as it certainly is, a ſhort examination of it appears abſolutely neceſſary.

The vulgate editions of the Pandects, and the manuſcripts from which they were printed, exhibit the reading above ſet forth; and it has accordingly been adopted by Cujas, P. Faber, Le Conte, Donellus, and *moſt* others, as giving a ſenſe both perſpicuous in itſelf and conſiſtent with the ſecond law; but the *Florentine* copy has *quidem*, and the copies from which the *Baſilica* were tranſlated three centuries after Juſtinian, appear to have contained the ſame word, ſince the Greeks have rendered it by a particle of ſimilar import. This variation in a ſingle letter makes a total alteration in the whole doctrine of Ulpian; for *if* it be agreed, that *diligentia* means, by a figure of

ſpeech, *a more than ordinary degree of diligence*, the common reading will imply, conformably with the ſecond law before cited, that "SOME of the preceding contracts demand that higher degree;" but the Florentine reading will denote, in contradiction to it, that "ALL of them require more than "ordinary exertions."

It is by no means my deſign to depreciate the authority of the venerable manuſcript preſerved at Florence; for although few civilians, I believe, agree with Politian, in ſuppoſing it to be one of the *originals*, (7) which were ſent by Juſtinian himſelf to the principal towns of Italy,* yet it may *poſſibly* be the very book, which the Emperor Lotharius II. is *ſaid* to have found at Amalfi about the year 1130, and gave to the citizens of Piſa, from whom it was taken near three hundred years after, by the Florentines, and has been kept by them with ſuperſtitious reverence:† be that as it may, the copy deſerves the higheſt reſpect; but if any proof be requiſite, that it is *no faultleſs* tranſcript, we may obſerve, that, in the very law before us, *accedunt* is erroneouſly written for *accidunt*; and the whole phraſe,

* Epiſt. l. 4. Miscell. cap. 41. See Gravina lib. i. §141.

† Taurelli. Præf. ad Pand. Florent.

7) See Gibbon's Dec. and Fall Rom. Emp. 8vo. edit. vol. 8 p. 44. 45 and notes.

indeed, in which that word occurs, is different from the copy uſed by the Greek interpreters, and conveys a meaning, as Bocerus and others have remarked, not ſupportable by any principle or analogy.

This, too, is indiſputably clear; that the ſentence, *in his QUIDEM et diligentiam*, is ungrammatical, and cannot be conſtrued according to the interpretation, which ſome contend for. What verb is underſtood? *Recipiunt.* What noun? *Contractûs.*—What then becomes of the words *in his*, namely *contractibus*, unleſs *in* ſignify *among*? And in that caſe, the difference between *QUIDEM* and *QUIDAM* vaniſhes; for the clauſe may ſtill import that "*among* the preceding "contracts (that is *in SOME of them*) more "than uſual diligence is exacted:" in this ſenſe the Greek prepoſition ſeems to have been taken by the ſcholiaſt on *HARMENOPULUS*; and it may here be mentioned, that *diligentia*, in the nominative, appears in ſome old copies, as the Greeks have rendered it; but Accurſius, Del Rio, and a few others, conſider the word as implying no more than diligence *in general*, and diſtinguiſh it into various *degrees* applicable to the ſeveral contracts, which Ulpian enumerates. We may add, that one or two interpreters thus explain the whole ſentence, "in his *contractibus* quidam *juriſconſulti* et

"diligentiam *requirunt*:" but this interpretation, if it could be admitted, would entirely deſtroy the authority of the clauſe, and imply, that Ulpian was of a different opinion. As to the laſt conjecture, that only *certain caſes* and *circumſtances* are meaned by the word *QUIDAM*, it ſcarce deſerves to be repeated. On the whole, I ſtrongly incline to prefer the vulgate reading, eſpecially as it is not conjectural, but has the authority of manuſcripts to ſupport it; and the miſtake of a letter might eaſily have been made by a tranſcriber, whom the prefaces, the epigram prefixed, and other circumſtances, prove to have been, as Taurilli himſelf admits, a Greek.(8) Whatever, in ſhort, be the genuine words of this much-controverted clauſe,(9) I am perſuaded, that it ought by no means to be ſtrained into an inconſiſtency with the *ſecond* law; and this

(8) See Gibbon's Rom. Emp. vol. 8. p. 44. note 87.

(9) Few verbal controverſies have been equally important with that on the conſtruction of the diſputed ſentence in Ulpian's commentary; for though the preponderancy of any of the various opinions urged on the ſubject, may have little or no influence on the ſettled maxims of our law, it muſt be obvious that the accuracy of the deciſion is materially connected with the clearneſs and arrangement of the general doctrine of Bailments: as the Roman juriſprudence is the ſource from which this general doctrine is derived, the learned and liberal lawyer will acknowledge conſiderable obligation to Sir William Jones for the acute and well ſupported reaſoning, by which he eſtabliſhes the true reading of the clauſe ("in his quidam et diligentiam.") in oppoſition to fanciful conjecture, and dogmatical aſſertion.

has been the opinion of *moſt* foreign juriſts from Azo and Alciat down to Heineccius and Huber; who, let their diſſenſion be, on other points, ever ſo great, think alike in diſtinguiſhing *three degrees* of neglect, which we may term *groſs*, *ordinary*, and *ſlight*, and in demanding reſponſibility for thoſe degrees according to the rule before expounded.

The law, then, on this head, which prevailed in the ancient Roman empire, and ſtill prevails in Germany, Spain, France, Italy, Holland, conſtituting, as it were, a part of the law of nations, is in ſubſtance what follows.

Definitions and rules.

GROSS neglect, *lata culpa*, or, as the Roman lawyers moſt accurately call it, *dolo proxima*, is in practice conſidered as equivalent to DOLUS, or FRAUD, itſelf; and conſiſts, according to the beſt interpreters, in the *omiſſion* of that care, *which even inattentive and thoughtleſs men never fail to take of their own property*: this fault they juſtly hold a violation of *good faith*.

ORDINARY neglect, *levis culpa*, is the *want* of that diligence which the *generality of mankind uſe in their own concerns*; that is, of *ordinary care*.

SLIGHT neglect, *leviſſima culpa*, is the *omiſſion* of that care which *very attentive and*

vigilant persons take of their own goods, or in other words, of *very exact diligence*.

Now, in order to ascertain the degree of neglect, for which a man, who has in his possession the goods of another, is made responsible by his contract, either *express* or *implied*, civilians establish *three* principles, which they deduce from the law of *Ulpian* on the *Edict*; and here it may be observed, that they frequently distinguish this law by the name of *Si ut certo*, and the other by that of *Contractus*;* as many poems and histories in ancient languages are denominated from their *initial* words.

First: In contracts, which are beneficial *solely* to the owner of the property holden by another, no more is demanded of the holder than *good faith*, and he is consequently responsible for nothing less than *gross* neglect: this, therefore, is the general rule in DEPOSITS; but, in regard to COMMISSIONS, or, as foreigners call them, MANDATES, and the *implied* contract *negotiorum, gestorum* a certain care is requisite from *the nature of the thing*; and as *good faith* itself demands, that such care

* Or 1. 5. § 2. ff. *Commod.* and 1. 23 ff. *de reg. jur.* Instead of *ff*, which is a barbarous corruption of the initial letter of *pandectæ*, many write D, for *Digest*, with more clearness and propriety. (10)

(10) See Gibbon's Rom. Emp. vol 8. p 2. note 1, for an obvious improvement on the old and confused manner of referring to the civil law.

be proportioned to the exigence of each particular case, the law *presumes*, that the mandatary or commissioner, and by parity of reason, the *negotiorum gestor*, engaged at the time of contracting to use a degree of diligence *adequate to the performance of the work undertaken.**

Secondly: In contracts *reciprocally* beneficial to *both* parties, as in those of SALE, HIRING, PLEDGING, PARTNERSHIP, and the contract implied in JOINT-PROPERTY, such care is exacted as *every prudent man commonly takes of his own goods*; and, by consequence, the *vendor*, the *hirer*, the *taker in pledge*, the *partner*, and the *co-proprietor*, are answerable for *ordinary* neglect.

Thirdly: In contracts, from which a benefit accrues *only* to him who has the goods in his custody, as in that of LENDING FOR USE, an *extraordinary* degree of care is demanded; and the *borrower* is, therefore responsible for *slight* negligence.

This had been the learning generally, and almost unanimously, received and taught by the doctors of Roman law; and it is very remarkable, that even Antoine Favre or Faber, who was famed for innovation and paradox, who published two ample volumes *De Erroribus Interpretum*, and whom

* *Spondet diligentiam*, say the Roman lawyers, *gerendo negotio parem.*

Gravina justly calls *the boldest of expositors and the keenest adversary of the practisers*,* discovered no error in the common interpretation of two celebrated laws, which have so direct and so powerful an influence over social life, and which he must repeatedly have considered: but the younger Godefroi of Geneva, a lawyer confessedly of eminent learning, who died about the middle of the last century, left behind him a regular *commentary* on the law *Contractus*, in which he boldly combats the sentiments of all his predecessors, and even of the ancient Romans, and endeavours to support a new system of his own.

System of J. Godefroi.

He adopts, in the first place, the *Florentine* reading, of which the student, I hope has formed by this time, a decided opinion from a preceding page of this Essay.

He censures the rule comprised in the law *Si ut certo* as weak and fallacious, yet

* Orig. Jur. Civ. lib. i. § 183. (11)

(11) The whole of Gravina's animadversion deserves to be quoted for the implied and salutary lesson it offers to the juvenile Quixotes, whose paradoxical weapons are frequently displayed with such exulting confidence in the field of literary controversy:—"Tandem in Antonio Fabro consistam audacissimo, et pragmaticorum hoste vehementissimo: qui aliis quidem in operibus acumen magis, quam veritatem prætitit; in codice vero sou usum rerum, et ingenii sui jam maturi ridiculi dedit nobis utilitatem: *ut meliora sint illius, quæ minus acuta.*

admits, that the rule, which he condemns, had the approbation and ſupport of Modeſtinus, of Paulus, of Africanus, of Gaius, and of the great Papinian himſelf; nor does he ſatisfactorily prove the *fallaciouſneſs* to which he objects, unleſs every rule be fallacious to which there are ſome exceptions. He underſtands by DILIGENTIA, that care which *a very attentive and vigilant man* takes of his own property; and he demands this care in *all* the eight contracts which immediately precede the diſputed clauſe: in the *two* which follow it, he requires no more than *ordinary* diligence.—He admits, however, the *three* degrees of neglect above ſtated, and uſes the common epithets *levis* and *leviſſima*; but in order to reconcile his ſyſtem with many laws, which evidently oppoſe it, he aſcribes to the old lawyers the wildeſt mutability of opinion, and is even forced to contend, that Ulpian himſelf *muſt have changed his mind.*

Since his work was not publiſhed, I believe, in his life-time, there may be reaſon to ſuſpect, that he had not completely ſettled *his own* mind; and he concludes, indeed, with referring the deciſion of every caſe on this head to that moſt dangerous and moſt

tremendous, power, *the discretion of the judge.**

The *triple* division of neglects had also been highly censured by some lawyers of reputation. Zasius had very justly remarked, that neglects differed in *degree*, but not in *species*; adding, "that he had no objection to the "use of the words *levis* and *levissima*, merely as terms of practice adopted in courts, "for the more easy distinction between the "different degrees of care exacted in the "performance of different contracts:"† but Donellus, in opposition to his master Duaren, insisted that *levis* and *levissima* differed in sound only, not in sense; and attempted to prove his assertion triumphantly by a regular syllogism;‡ the minor proposition of which is raised on the figurative and inaccurate manner, in which positives are often used for superlatives, and, conversely, even by the best of the old Roman lawyers. True it is, that, in the law Contractus, the division appears to be *twofold*

Systems of Zasius and Donellus.

* "Ego certe hac in re censentibus accedo, vix quidquam generalius definiri posse; temique hanc ad *arbitrium judicis*, prout "res est, referendam." p. 141.

† Zas. Singul. Resp. lib. i. cap. 2.

‡ "Quorum definitiones eædem sunt ea inter se sunt eadem; "*levis* autem culpa et *levissima* una et eadem definitio est; manifestè igitur culpa eadem. Comm. Jur. Civ. lib. xvi. cap. 7.

only, dolus and culpa; which differ in *ſpecies*, when the firſt means *actual fraud and malice*, but in *degree* merely when it denotes no more than *groſs neglect*; and, in either caſe, the ſecond branch, being capable of *more* and *leſs*, may be ſubdivided into *ordinary* and *ſlight*; a ſubdiviſion which the law *Si ut certo* obviouſly requires: and thus are both laws perfectly reconciled.

We may apply the ſame reaſoning, changing what ſhould be changed, to the *triple* diviſion of *diligence*; for, when *good faith* is conſidered as implying at leaſt the exertion of *ſlight* attention, the other branch, *Care*, is ſubdiviſible into *ordinary* and *extraordinary*; which brings us back to the number of degrees already eſtabliſhed both by the analyſis and by authority.

System of Le Brun. Nevertheleſs, a ſyſtem, in one part entirely new, was broached in the preſent century, by an advocate in the Parliament of Paris, who may, probably, be now living, and, poſſibly, in that profeſſional ſtation, (12) to which his

(12) It is ſcarcely neceſſary to inform the reader, that the juridical ſyſtem to which our author here alludes, and conſequently the various departments of its adminiſtration, no longer ſubſiſt in France. The magiſterial ſituations in the ancient French parliaments or courts of judicature, were notoriouſly obtained by purchaſe; hiſtory, however, to the honor of the members of the courts in queſtion, records many inſtances of their ſpirited reſiſtance to the arbitrary edicts of the "*Grand Monarque*;" and the prophetic penetration of Blackſtone (Com-

learning and acuteness justly intitle him.—I speak of M. Le Brun, who published, not many years ago, an *Essay on Responsibility for Neglect*,* which he had nearly finished before he had seen the Commentary of Godefroi, and, in all probability, without ever being acquainted with the opinion of Donellus.

This author sharply reproves the *triple* division of neglects, and seems to disregard the rule concerning a benefit arising to *both*, or to *one*, of the contracting parties; yet he charges Godefroi with a want of due clearness in his ideas, and with a palpable misinterpretation of several laws. He reads *in his quidem et diligentiam*; and that with an air of triumph; insinuating, that *quidam* was only an artful conjecture of Cujas and Le Conte, for the purpose of establishing *their* system; and he supports *his own* reading by the authority of the Basilica; an authority, which, on another occasion, he depreciates. He derides the absurdity of *per-*

* *Essai sur la Prestation des Fautes.* à Paris, chez Saugrain, 1764.

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vol. 7. p. 269) pronounced, that the restoration of Gallic freedom should it ever take place, would be owing "to the efforts of those assemblies." This prediction has been strikingly verified; but it cannot be supposed that the patriotic members of the Parliament of Paris in the least anticipated the singular and furious excesses of moral and political innovation, which their country has within these few years exhibited, to the astonishment of Europe.

mitting negligence in any contract, and
that such *permission*, as he calls it, is
express law: "now, says he, where
"tract is beneficial to both parties, t
"tors permit *slight* negligence, whic
"slight soever, is still *negligence*, and
always to be inhibited." He warm
tends, that the Roman laws, proper
derstood, admit only *two* degree o
gence; one, measured by that, w
provident and attentive father of a fam
in his own concerns; another, by tha
which the *individual party*, of whom i
quired, *is accustomed to take of his own*
tions; and he, very ingeniously sub
a new rule in the place of that which
jects; namely, that, *when the things i*
tion are the SOLE property of the person t
they must be restored, the holder of t
obliged to keep them with the *first*
of diligence; whence he decides, tha
rower and a *hirer* are responsible for p
ly the same neglect; that a vendor, w
retains for a time the custody of the go
sold, is under the same obligation, in
spect of care, with a man, who undertal
to manage the affairs of another, either wi
out his request as a *negotiorum gester*, or wi
it, as a *mandatary*:—"but," says he, "wh
"*the things are the JOINT property of the pa*
"*ties contracting*, no higher diligence can b

" required than the second degree, or that, " which the *acting party* commonly uses in " *his own* affairs; and it is sufficient, *if he* " *keep them, as he keeps his own.*" This he conceives to be the distinction between the *eight* contracts, which precede, and the *two*, which follow, the words *in his quidem et diligentiam.*

Throughout his work he displays no small sagacity and erudition, but speaks with too much confidence of his own decisions, and with too much asperity or contempt of all other interpreters from Bartolus to Vinius.

At the time when this author wrote, the learned M. Pothier was composing some of his admirable Treatises on all the different species of express or implied *contracts*; and here I seize, with pleasure [illegible] *his age and* nity of recommending those [illegible]ve taken; that English lawyer, exhorting hi[illegible] *individual par-* again and again; for, if h[illegible]*n affairs*, cannot Littleton has given him, as [illegible]f judicial inqui- sumed, a taste for lumi[illegible]-ministrator, part- site examples, and a [illegible]r, must be *presumed* by which nothing is redu[illegible] or commissioners, be- cient, he will surely[illegible]ount is taken, or a dis- works, in which all [illegible]ion made, to use in *their* combined, and the g[illegible]h diligence, as is com- *ll prudent men*; that is a

is law at Weſtminſter as well as at Orleans:* for my own part, I am ſo charmed with them, that if my undiſſembled fondness for the ſtudy of juriſprudence were never to produce any greater benefit to the public, than barely the introduction of Pothier to the acquaintance of my countrymen, I ſhould think that I had in ſome meaſure diſcharged the debt, which *every man*, according to Lord Coke, (13) *owes to his profeſſion.*

Vindication of the old ſyſtem of Pothier.

To this venerable profeſſor and judge, for he had ſuſtained both characters with deſerved applauſe, Le Brun ſent a copy of his little work; and M. Pothier honored it with a ſhort, but complete, anſwer of intelligence, declaring, at the ſame time, that *rower* and a *bi[illegible]ter into a literary conteſt*, and ly the ſame ne[illegible] his fixed adherence to the retains for a tim[illegible] which he politely aſcribes ſold, is under t[illegible] *bias of an old man in ſa-*ſpect of care, w[illegible] *early imbibed.* This is to manage the affairs [illegible] anſwer: "That he *out* his requeſt as a *neg* it, as a *mandatary*:—" [illegible] "*the things are the ſame* "*ties contracting*, no high[illegible]

* Paris, chez DEBURE: 28 vol. to. The illuſtrious author di[illegible]en pages, at the end of his

[illegible]ef, p. 34,

" can diſcover no kind of abſurdity in the " uſual diviſion of *neglect* and *diligence*, nor " in the *rule*, by which different *degrees* of " them are applied to different contracts ; " that, to ſpeak with ſtrict propriety, negli- " gence is not *permitted* in any contract, but " *a leſs rigorous conſtruction* prevails in ſome " than in others ; that a *hirer*, for inſtance, " is not conſidered as *negligent*, when he " takes the ſame care of the goods hired, " which the generality of mankind take of " their own ; that the *letter to hire*, who has " his reward, muſt be preſumed to have de- " manded at firſt no higher degree of dili- " gence, and cannot juſtly complain of that " *inattention*, which in another caſe might " have been culpable ; for a *lender*, who has " *no* reward, may fairly exact from the bor- " rower that *extraordinary* degree of care, " which *a very attentive perſon of his age and* " *quality* would certainly have taken ; that " the diligence, which *the* INDIVIDUAL *par-* " *ty commonly uſes in his own affairs*, cannot " properly be the object of judicial inqui- " ry ; for *every* truſtee, adminiſtrator, part- " ner, or co-proprietor, muſt be *preſumed* by " the court, auditors, or commiſſioners, be- " fore whom an account is taken, or a diſ- " tribution or partition made, to uſe in *their* " *own* concerns ſuch diligence, as is com- " monly uſed by *all prudent men* ; that is a

"violation of *good faith* for any man to "take leſs care of another's property, which "has been intruſted to him, *than of his own;* "that conſequently, the author of the new "ſyſtem demands no more of a *partner* or a "*joint-owner* than of a *depoſitary*, who is "bound to keep the goods depoſited *as he* "*keeps his own;* which is directly repug- "nant to the indiſputable and undiſputed "ſenſe of the law Contractus."

I cannot learn whether M. Le Brun ever publiſhed a reply, but am inclined to believe that his ſyſtem has gained very little ground in France, and that the old interpretation continues univerſally admitted on the Continent both by theoriſts and practiſers.

Nothing material can be added to Pothier's argument, which in my humble opinion, is unanſwerable; but it may not be wholly uſeleſs to ſet down a few general remarks on the controverſy: particular obſervations might be multiplied without end.

Observations on Le Brun.

The only *eſſential* difference between the ſyſtems of Godefroi and Le Brun relates to the *two* contracts, which follow the much-diſputed clauſe; for the Swiſs lawyer makes the partner and co-proprietor anſwerable for *ordinary* neglect, and the French advocate demands no more from them than *common hon-*

esty; now, in this respect, the error of the *second* system has been proved to demonstration; and the author of it himself confesses ingenuously, that the other part of it fails in the article of *Marriage-portions*.*

In regard to the division of neglect and care into *three* degrees or *two*, the dispute appears to be merely verbal; yet, even on this head, Le Brun seems to be self-confuted; he begins with engaging to prove "that only *two* degrees of fault are distinguished by the laws of Rome," and ends with drawing a conclusion, that they acknowledge but *one* degree: now, though this might be only a slip, yet the whole tenor of his book establishes *two* modes of *diligence*, the *omissions* of which are *as many* neglects; exclusively of *gross* neglect, which he likewise admits, for the *culpa levissima* only is that, which he repudiates. It is true, that he gives no epithet or name to the omission of his *second* mode of care; and, had he searched for an epithet, he could have found no other than *gross*; which would have demonstrated the weakness of his whole system.†

The disquisition amounts, in fact, to this: from the barrenness of *poverty*, as Lucre-

* See p. 71. Note; and p. 126.

† See pages 32, 73, 74, 119.

tius (14) calls it, of the Latin language, the ſingle word *CULPA* includes, as a generic term, various degrees of ſhades of *fault*, which are ſometimes diſtinguiſhed by epithets, and ſometimes left without any diſtinction; but the Greek, which is rich and flexible, has a term expreſſive of almoſt every ſhade, and the tranſlators of the law Contractus actually uſe the words *'ratbumia* and *amellia*, which are by no means ſynonymous, the former implying a certain *eaſineſs of mind* or *remiſſneſs of attention*, while the ſecond imports a higher and more culpable degree of *negligence*.* This obſervation, indeed, ſeems to favor the ſyſtem of Godefroi; but I lay no great ſtreſs on the mere words of the tranſlation, as I cannot perſuade myſelf, that the Greek juriſts under Baſilius and Leo were perfectly acquainted with the niceties and genuine purity of their language; and there are invincible reaſons, as, I hope, it has been proved, for rejecting all ſyſtems but that, which Pothier has recommended and illuſtrated.

* Baſilica, 2, 3, 23. See Demosth. 3 Phil. Reiske's edit. I. 112, 3. For *leviſſima culpa*, which occurs but once in the whole body of Roman law, *'ratbumia* ſeems the proper word in Greek; and it is actually ſo used in the Baſilica, 60. 3. 5. where mention is made of the Aquilian law, *in qua*, ſays Ulpian, *et leviſſima culpa venit*. D. 9. 2 44.

(14) De Rer. Nat. lib. 1. line 140.

I come now to the laws of our own country, in which the same distinctions and the same rules, notwithstanding a few clashing authorities, will be found to prevail; and here I might proceed chronologically from the oldest *Year-book* or *Treatise* to the latest adjudged *Case*; but, as there would be a most unpleasing dryness in that method, I think it better to examine separately every distinct *species* of bailment, (15) observing at the same time, under each head, a kind of historical order. It must have occurred to the reader, that I might easily have taken a wider field, and have extended my inquiry to every possible case, in which a man *possesses for a time the goods of another*; but I chose to confine myself within certain limits, lest, by grasping at too vast a subject, I should at last be compelled, as it frequently happens, by accident or want of leisure, to leave the whole work unfinished: it will be sufficient to remark, that the rules are in general the same, by whatever means the goods *are legally* in the hands of the possessor, whether by delivery from the owner, which is a proper *bailment*, or from any other person, by finding,* or in consequence of some distinct contract. English law.

* Doct. and Stud. dial. 2. ch. 38. Lord Raym. 909. 917. See Ow. 141. 1. Leon. 224. 1 Cro. 219. Mulgrave and Ogden.

(15) See Gibbon's Rom. Emp. vol. 8. p. 84, 85, 87.

Lord Holt's division of bailments.

Sir John Holt, whom every Engliſhman ſhould mention with reſpect, and from whom no Engliſh lawyer ſhould venture to diſſent without extreme diffidence, has taken a comprehenſive view of this whole ſubject in his judgment on a celebrated caſe, (16) which ſhall ſoon be cited at length; but, highly as I venerate his deep learning and ſingular ſagacity, I ſhall find myſelf conſtrained, in ſome few inſtances, to differ from him, and ſhall be preſumptuous enough to offer a correction or two in part of the doctrine, which he propounds in the courſe of his argument.*

His diviſion of bailments into *ſix* ſorts appears, in the firſt place, a little inaccurate; for, in truth, his *fifth* ſort is no more than a branch of his *third*, and he might, with equal reaſon, have added a *ſeventh*, ſince the fifth is capable of another ſubdiviſion. I acknowledge, therefore, but *five* ſpecies of bailment; which I ſhall now enumerate and define, with all the Latin names, one or two of which Lord Holt has omitted. 1. DEPOSITUM, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. MAN-

New division and definitions.

* Lord Raym. 912.

(16) Coggs v. Bernard, 2 Lord Raym. 909. See post, p. 58, and the case at full in the Appendix.

DATUM, or *commiſſion*; when the mandatary undertakes, without recompence, to *do ſome act* about the things bailed, or ſimply to carry them; and hence Sir Henry Finch divides bailment into *two* ſorts, to *keep* and to *employ*.* 3. COMMODATUM, or *loan for uſe*; when goods are bailed, without pay, to be *uſed* for a certain time by the bailee. 4. PIGNORI ACCEPTUM; when a thing is bailed by a debtor to his creditor in *pledge*, or as a ſecurity for the debt. 5. LOCATUM, or *hiring*, which is always for *a reward*; and this bailment is either, 1. *locatio rei*, by which the hirer gains the temporary uſe of *the thing*; or, 2. *locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed or beſtowed on the thing delivered; or, 3. *locatio operis mercium vehendarum*, when goods are bailed for the purpoſe of being *carried* from place to place, either to a *public* carrier, or to a *private* perſon.(17)

I. The moſt ancient caſe, that I can find in our books, on the doctrine of DEPOSITS, (there were others, in- Law of deposits.

* Law, b. 2. ch. 18.

(17) This division and classification of the different species of Bailment, will be considered by the student of the English law, as preferable both to Lord Holt's Analysis and the Order of the Imperial Institutes. See Vinnius in Instit. lib. 3. tit. 15.

deed, a few years earlier, which turned on points of pleading,) was adjudged in the eighth of Edward II. and is abridged by Fitzherbert.* It may be called Bonion's case, from the name of the plaintiff, and was, in substance, this: An action of detinue was brought for *seals, plate*, and *jewels*, and the defendant pleaded, "that "the plantiff had bailed to him a cheft *to* "*be kept*, which cheft was *locked*; that the "bailor himself took away the key, *without* "*informing the bailee of the contents*; that "robbers came in the NIGHT, *broke open* "*the defendant's chamber*, and carried off "the cheft into the fields, where they forced "the lock, and took out the *contents*; that "the defendant was robbed at the same "time of his own goods." The plaintiff replied, "that the jewels were delivered, in "a cheft *not locked*, to be reftored at the "pleafure of the bailor," and *on this*, it is faid, *iffue was joined.*

Bonion's case.

Upon this cafe Lord Holt obferves, "that "he cannot fee, why the bailee fhould not "be charged with goods *in* a cheft as well "as with goods *out of* a cheft; for, fays he, "the bailee has as little power over them, "as to any benefit that he might have from "them, and as great power to defend them

* Mayn. Edw. II. 275. Fitz. Abr. *tit.* Detinue, 59.

"in one caſe as in the other."* The very learned judge was diſſatisfied, we ſee, with Sir Edward Coke's reaſon, "That, when "the jewels were locked up in a cheſt, the "bailee was not, in fact, truſted with "them."† Now there was a diverſity of opinion, upon this very point, among the greateſt lawyers of Rome; for "it was a "queſtion, whether, if a box ſealed up had "been depoſited, the box only ſhould be "demanded in an action, or the clothes, "which it contained, ſhould alſo be ſpeci-"fied; and TREBATIUS inſiſts, that the "box only, not the particular contents of it "muſt be ſued for; unleſs the things were "previouſly ſhewn, and then depoſited: "but Labeo aſſerts, that he, who depoſits "the box, depoſits the contents of it; and "ought therefore, to demand the clothes "themſelves. What then, if the depoſita-"ry *was ignorant of the contents?* It ſeems "to make no great difference, ſince he took "the charge upon himſelf; and I am of "opinion, ſays Ulpian, that, although the "box was ſealed up, yet an action may be "brought for what it contained."‡ This relates chiefly to the form of the libel; but, ſurely, caſes may be put in which the difference may be very material as to the *defence*. Diamonds, gold, and precious trin-

* Lord Raym. 914. † 4 Rep. 84. ‡ D. 16. 3 1. 41.

kets, ought, *from their nature*, to be kept with peculiar care under lock and key: it would therefore, be *groſs* negligence in a depoſitary to leave ſuch a depoſit in an open antichamber, and *ordinary* neglect, at leaſt, to let them remain on his table, where they might poſſibly tempt his ſervants; but no man can proportion his care to the *nature* of things, without knowing them: perhaps, therefore, it would be no more than *ſlight* neglect, to leave out of a drawer a box or caſket, which was neither known, nor could juſtly be ſuſpected, to contain diamonds; and Domat, (18) who prefers the opinion of Trebatius, decides "that, in ſuch a caſe, "the depoſitary would only be obliged to "reſtore the caſket, as it was delivered, "without being reſponſible for the contents "of it." I confeſs, however, that, anxiously as I wiſh on all occaſions to ſee authorities reſpected, and judgments holden ſacred, Bonion's caſe appears to me wholly incomprehenſible; for the defendant inſtead of having been *groſsly* negligent, (which alone could have expoſed him to an action,) ſeems to have uſed at leaſt *ordinary* diligence; and, after all, the loſs was occaſioned by a *burglary*, for which no bailee can be reſponſible without a very ſpecial under-

(18) Civ. Law, lib. 1, tit. 7, § 1.

taking. The plea, therefore, in this caſe was good, and the replication, idle; nor could I ever help ſuſpecting a miſtake in the laſt words *alii quòd non*; although Richard de Winchedon, or whoever was the compiler of the *table* to this Year-book, makes a diſtinction, that "if jewels be bailed "to me, and *I put them* into a caſket, and "*thieves rob me of them in the night-time*, I am "anſwerable; not, if they be *delivered* to me "in a cheſt *ſealed up*;" which could never have been law; for the next oldeſt caſe, in the book of Aſſiſe, contains the opinion of Chief Juſtice Thorpe, that "a general "bailee *to keep* is not reſponſible, *if the* "*goods be ſtolen*, without his *groſs* neglect;"* and it appears, indeed, from Fitzherbert, that the party was driven to this iſſue, "whether the goods were taken away by "*robbers*."

Mosaic laws.

By the Moſaic inſtitutions, "if a man delivered to his "neighbor MONEY or STUFF *to keep*, and "it was *ſtolen* out of his houſe, and the thief "could not be found, the maſter of the "houſe was to be brought before the judge, "and to be discharged, if he could ſwear, "that he had not *put his hands* unto his "neighbor's goods,"† or, as the Roman

* 29 Ass. 28. Bro. Abr. *tit.* Bailment, pl. 7.

† Exod. xxii. 7, 8.

author of the *Lex Dei* translates it, *Nihil se nequiter gessisse*:* but a distinction seems to have been made between a stealing by *day* and a stealing by *night*;† and "if CATTLE "were bailed and stolen, (by *day*, I pre- "sume,) the person who had the care of "them was bound to make restitution to "the owner;"‡ for which the reason seems to be, that, when *cattle* are delivered *to be kept*, the bailee is rather a *mandatary* than a depositary, and is, consequently, obliged to use a degree of diligence *adequate to the charge*; now sheep can hardly be stolen in the *day-time* without some neglect of the shepherd; and we find that, when Jacob, who was, for a long time at least, a bailee of a different sort, *as he had a reward*, lost any of the beasts intrusted to his care, Laban made him answer for them "whether stolen "by day or stolen by night."§

Notwithstanding the high antiquity, as well as the manifest good sense, of the rule, a contrary doctrine was advanced by Sir Edward Coke in his Reports, and afterwards deliberately inserted in his Commentary on Littleton, the great result of all his experience and learning; namely, "that "a depositary is responsible, if the goods

* Lib. 10. De Deposito. This book is printed in the same volume with the Theodosian Code, Paris, 1586.

†Gen. xxxi. 39. ‡Exod. xxii. 12. §Gen. xxxi. 39.

"be ſtolen from him, unleſs he accept "them ſpecially *to keep as his own*," whence he adviſes all depoſitaries to make ſuch a ſpecial acceptance.* This opinion, ſo repugnant to natural reaſon and the laws of all other nations, he grounded partly on ſome broken caſes in the Year-books, mere converſations on the bench, or looſe arguments at the bar; and partly on Southcote's caſe, which he has reported, and which by no means warrants his deduction from it. As I humbly conceive that caſe to be law, though the doctrine of the learned reporter cannot in all points be maintained, (19) I ſhall offer a few remarks on the pleadings in the cauſe, and the judgment given on them.

Southcote's case.

Southcote declared in detinue, that he had delivered goods to Bennet, *to be by him* SAFELY *kept*: the defendant confeſſed SUCH delivery, but pleaded in bar, that a certain perſon STOLE them out of his poſſeſſion; the plantiff replied, proteſting that he had not been robbed, that the perſon named in the plea was a SERVANT of the defendant, and demanded judgment; which, on a general demurrer to the replication, he obtained. "The reaſon of the judgment, ſays Lord

* 4 Rep 83. b. 1 Inſt. 89. a b

(19) See 2 Ld. Ray. 911, and note (c) 912—914.

" Coke, was, becauſe the plaintiff had de-
" livered the goods to be SAFELY kept, and
" the defendant had taken the charge of
" them upon himſelf, by accepting them on
" SUCH a delivery." Had the reporter ſtop-
ped here, I do not ſee what poſſible objec-
tion could have been made; but his exu-
berant erudition boiled over, and produced
the frothy conceit, which has occaſioned ſo
many reflections on the caſe itſelf; namely,
" that *to KEEP* and *to keep SAFELY* are one
" and the ſame thing;" a notion, which
was denied to be law by the whole court in
the time of Chief Juſtice Holt.*

It is far from my intent to ſpeak in dero-
gation of the great commentator or Little-
ton; ſince it may truly be aſſerted of him,
as Quintilian ſaid of Cicero, that *an admi-
ration of his works is a ſure mark of ſome pro-
ficiency in the ſtudy of the law;* (20) but it

* Ld. Raym. 911. *margin.*

(20) " Ille se profecisse sciat, cui Cicero valde placebit." Instit. Orat. lib. 10. c. 1. § 6 Among the orators and statesmen of the ancient world, none has established a fairer claim to the applause and gratitude of posterity than Cicero: his orations are models of all that is to be admired and studied in eloquence—his other valuable productions have transmitted the best precepts of the rhetorical science, and the moral wisdom of a mind that, amidst the most important public avocations, carefully and profoundly noted every circumstance illustrative of the duties of men. This example should not be forgotten by those who are most busily engaged in the pursuits of honorable ambition: knowledge acquired by intercourse with mankind is of the highest practical value, and

muſt be allowed, that his profuſe learning often ran wild, and that he has injured many a good caſe by the vanity of thinking to improve them.

The pleader who drew the replication in Southcote's caſe, muſt have entertained an idea, that the *blame* was *greater*, if a *ſervant* of the depoſitary ſtole the goods, than if a mere *ſtranger* had purloined them; ſince the defendant ought to have been more on his guard againſt a perſon, who had ſo many opportunities of ſtealing; and it was his own fault, if he gave thoſe opportunities to a man, of whoſe honeſty he was not morally certain: the court, we find, rejected this diſtinction, and alſo held the replication informal, but agreed, that no advantage could be taken on a *general* demurrer of ſuch informality, and gave judgment on the ſubſtantial badneſs of the plea.* If the plaintiff, inſtead of replying, had demurred to the plea in bar, he might have inſiſted in argument, with reaſon and law on his ſide, "that, although a *general* bailee *to keep* be "reſponſible for GROSS neglect *only*, yet

* 1 Cro. 815.

when communicated under the ſanction of reſpectable talents and character, will not be imparted in vain. Thus might many great men ſecure a celebrity independent of the caprice of contemporary applauſe, and cloſe the ſcene of life with the conſcious exclamation of the poet, "Exegi monumentum ære "perennius."

" Bennet had, by a *ſpecial* acceptance, made " himſelf anſwerable for ORDINARY neglect " *at leaſt*; that it was *ordinary* neglect to " let the goods be *ſtolen* out of his poſſeſ- " ſion, and he had not averred that they " were ſtolen *without his default*; that he " ought to have put them into a *ſafe* place, " according to his undertaking, and have " kept the key of it himſelf; that the *ſpe-* " *cial* bailee was reduced to the claſs of a " *conductor operis*, or a workman *for hire*; " and that a tailor, to whom his employer " has delivered lace for a ſuit of clothes, is " bound, if the lace be *ſtolen*, to reſtore the " value of it."* This reaſoning would not have been juſt, if the bailee had pleaded, as in Bonion's caſe, that he had been *robbed by violence*, for no degree of *care* can, in general, prevent an open robbery: *impetus prædonum*, ſays Ulpian, *a nullo præſtantur*.

Mr. Juſtice Powell, ſpeaking of Southcote's caſe, which he denies to be law, admits, that, " if a man *does* undertake *ſpecial-*

* " Alia eſt *furti* ratio; id enim *non casui*, ſed *levi culpæ*, " ferme ascribitur" *Goth. fr.* Comm. in L. *Contractus*, p. 145. See D. 17. 2. 52. 3. where, says the annotator, " Adver- " sus *latrones* parum prodest custodia; adversus *furem* pro- " desse potest, si quis advigilet." See also POTH. *Contrat de Louage*, n. 429. and *Contrat de Pret a usage*, n. 53. So, by Justice *Cottesmore*, " Si jeo grante byens a un home a garder " a mon oeps, si les byens, per *son mesgarde* sont *emblés*, il sera " charge a moy de mesmes les byens, mez s'il y it *robbe* de " mesmes les byens, il est excusable per le ley." 10 Hen. VI. 21.

"*ly* to keep goods SAFELY, that is a war-
" ranty, and will oblige the bailee to keep
" them safely against perils, where *he has a*
" *remedy over*, but *not* against those where he
" has *no* remedy over."* One is unwilling to suppose, that this learned judge had not read Lord *Coke's* report with attention; yet the case, which he puts, is precisely that which he opposes, for Bennet *did* undertake "to keep the goods SAFELY;" and, with submission, *the degree of care demanded*, not *the remedy over*, is the true measure of the obligation; for the bailee might have his *appeal of robbery*, yet he is not bound to keep the goods against *robbers* without a most express agreement.† This, I apprehend, is all that was meaned by St. GERMAN, when he says, "that, if a man *have*
" *nothing* for keeping the goods bailed, and
" promise, at the time of the delivery, to
" restore them *safe at his peril*, he is not re-
sponsible for *mere casualties*;"‡ but the rule extracted from this passage, "that *a special*
" acceptance *to keep safely* will not charge
" the bailee against the acts of *wrong-doers*,"‖ to which purport HOBART also and CROKE are cited, is too general, and must be confined to acts of *violence*.

*Ld Raym. 912 †2 Sho. pl. 166.
‡Doct. and Stud. dial 2. chap. 38.
‖Com. 135. Ld. Raym. 915.

I cannot leave this point without remarking, that a *tenant at will*, whose interest, when he has it rent-free, the Romans called PRECARIUM, stands in a situation exactly parallel to that of a depositary; for, although the contract be for *his benefit*, and, in some instances, for his benefit *only*, yet he has an *interest* in the land till the will is determined, "and, our law adds, it is the folly of the lessor, if he do not restrain him by a special "condition:" thence it was adjudged, in the Countess of Shrewsbury's case, "that an "action will not lie against a tenant at will "*generally*, if the house be burned through "his neglect;"* but, says Justice Powel, "had the action been founded on a *special* "undertaking, as that, in consideration that "the lessor would let him live in the house, "he would deliver it up *in as good repair as* "*it then was in*, such an action would have "been maintainable."†

Rules and exceptions.

It being then established, that a bailee of the *first* sort is answerable only for a *fraud*, or for *gross* neglect, which is considered as evidence of it, and not for such *ordinary* inattentions as may be compatible with *good faith*, if the depositary be himself *a careless and inattentive* man; a question may arise, whether, if proof be given, that he is, in

* 5 Rep. 13. b. † Ld. Raym. 911.

truth, very *thoughtful and vigilant in his own concerns*, he is not bound to reſtitution, if the depoſit be loſt through his neglect, either *ordinary* or *ſlight*; and it ſeems eaſy to ſupport the affirmative; ſince in this caſe the meaſure of diligence is *that which the bailee uſes in his own affairs*. It muſt, however, be confeſſed, that the character of the individual depoſitary can hardly be an object of judicial diſcuſſion: if he be *ſlightly* or even *ordinarily* negligent in keeping the goods depoſited, the favorable preſumption is, that he is equally neglectful of his own property; but this preſumption, like all others, may be repelled; and, if it be proved, for inſtance, that, his houſe being on fire, he ſaved his own goods, and having time and power to ſave alſo thoſe depoſited, ſuffered them to be burned, he ſhall reſtore the worth of them to the owner.* If indeed, he have time to ſave only one of two cheſts, and one be a depoſit, the other his own property, he may juſtly prefer his own; unleſs that contain things of ſmall comparative value, and the other be full of much more precious goods, as fine linen, or ſilks; in which caſe he ought to ſave the more valuable cheſt, and has a right to claim indemnification from the depoſitor

* Poth. *Contrat. de depot*, n. 29. Stiernh. *de Jure Sueon.* l. 2. c. 5.

for the loſs of his own. Still farther; if he commit even a *groſs* neglect in regard to his own goods *as well as* thoſe bailed, by which *both* are lost or damaged, *he cannot be ſaid to have violated good faith*, and the bailor muſt impute to his own folly the confidence which he repoſed in ſo improvident and thoughtleſs a perſon.*

To this principle, that a depoſitary is anſwerable *only* for *groſs* negligence, there are ſome exceptions.

Firſt, as in Southcote's caſe, where the bailee, by a *ſpecial* agreement, has engaged to anſwer for leſs: "Si quid nominatim con-"venit," ſays the Roman lawyer, "velplus "vel minus in ſingulis contractibus, hoc ſer-"vabitur quod initio convenit; legem enim "contractui dedit;"† but the opinion of Celſus, that an agreement *to diſpenſe with deceit* is void, as being contrary to good morals and decency, has the aſſent both of Ulpian and our English courts.‡

Secondly; when a man ſpontaneouſly and officiouſly propoſes to keep the goods of another, *he may prevent the owner from intruſting them with a perſon of more approved vigilance;* for which reaſon *he takes upon himſelf*, according to Julian, *the riſk of the depoſit*,

* Bract. 99 b. Justin. Inst. 1. 3. tit. 15.

† 1. Contractus, 23. D. de reg. jur.

‡ Doct. and Stud. dial. 2. chap. 38.

*and becomes reſponſible at leaſt for ordinary neglect, but not for mere caſualties.**

Where things are depoſited through neceſſity on any ſudden emergence, as a fire or a ſhipwreck, M. Le Brun inſiſts, "that "the depoſitary muſt anſwer for *leſs than* "*groſs* neglect, how careleſs ſoever he may "be in his own affairs; ſince the preceding remark, that *a man, who repoſes con-* "*fidence in an improvident perſon, muſt im-* "*pute any loſs to his own folly*, is inapplicable to a caſe where the depoſit was not "optional; and *the law ceaſes with the rea-* "*ſon of it*;"† but that is not the *only* reaſon; and, though it is an additional misfortune, for a man in extreme haſte and deep diſtreſs to light upon a ſtupid or inattentive depoſitary, yet I can hardly perſuade myſelf, that more than perfect *good faith* is demanded in this caſe, although a violation of that faith be certainly more criminal than in other caſes, and was therefore puniſhed at Rome by a forfeiture of the double value of the goods depoſited.

In theſe circumſtances, however, a benevolent *offer* of keeping another's property for a time would not, I think, bring the caſe within Julian's rule before-mentioned, ſo as to make the perſon offering anſwerable for

* D. 16 3. 1. 35.

† De la Preſtation des Fautes, p. 77.

ſlight, or even *ordinary*, negligence; and my opinion is confirmed by the authority of Labeo, who requires no more than *good faith* of a *negotiorum geſtor*, when "affectione coactus, "ne bona mea diſtrahantur, negotiis ſe meis "obtulerit."

Thirdly; when the bailee, improperly called a *depoſitary*, either *directly* demands and receives a reward *for his care*, or takes the charge of goods *in conſequence of* ſome *lucrative* contract, he becomes anſwerable for *ordinary* neglect; ſince, in truth, he is in both caſes a *conductor operis*, and *lets out* his mental labor at a juſt price; thus, when clothes are left with a man, who is paid for the uſe of his bath, or a trunk with an innkeeper or his ſervants, or with a ferry-man, the bailees are as much bound to indemnify the owners, if the goods be loſt or damaged through their want of *ordinary* circumſpection, as if they were to receive a ſtipulated recompence *for their attention and pains*; but of this more fully, when we come to the article of *hiring*.

Fourthly; when the *bailee alone* receives advantage from the depoſit, as, if a thing be borrowed on a future event, and depoſited with the intended borrower, until the event happens, becauſe the owner, perhaps, is likely to be abſent at the time, ſuch a depoſitary muſt anſwer even for *ſlight* negligence;

and this bailment, indeed, is rather a *loan* than a depoſit, in whatever light it may be conſidered by the parties. Suppoſe, for example, that Charles, intending to appear at a maſked ball expected to be given on a future night, requeſts George to lend him a dreſs and jewels for that purpoſe, and that George, being obliged to go immediately into the country, deſires Charles to keep the dreſs till his return, and, if the ball be given in the mean time, to wear it; this ſeems to be a regular *loan*, although the original purpoſe of borrowing be future and contingent.

Since, therefore, the two laſt caſes are not, in ſtrict propriety, *depoſits*, the exceptions to the general rule are reduced to two only; and the ſecond of them, I conceive, will not be rejected by the Engliſh lawyer, although I recollect no deciſion or dictum exactly conformable to the opinion of Julian.

Clearly as the obligation to *reſtore* a depoſit flows from the nature and definition of this contract, yet, in the reign of Elizabeth, when it had been adjudged, conſiſtently with common ſenſe and common honeſty, "that an action on the caſe lay a-"gainſt a man, who had not performed his "promiſe in redelivering, or delivering o-"ver, things bailed to him," that judgment was *reverſed*; and in the 6th year of James,

judgment for the plaintiff was arreſted in a caſe exactly ſimilar :* it is no wonder that the profeſſion *grumbled*, as Lord Holt ſays, at ſo abſurd a reverſal; which was itſelf moſt juſtly reverſed a few years after, and the firſt deciſion ſolemnly eſtabliſhed.†

Grecian and Arabian laws.

Among the curious remains of Attic law, which philologers have collected, very little relates to the contracts which are the ſubject of this Eſſay; but I remember to have read of Demoſthenes, that he was advocate for a perſon, with whom *three* men had depoſited ſome valuable utenſils of which they were joint-owners; and the depoſitary had delivered it to *one* of them, of whoſe knavery he had no ſuſpicion; upon which the other *two* brought an action, but were nonſuited on their own evidence, that there was a *third* bailor, whom they had not joined in the ſuit; for, the truth not being proved, Demoſthenes inſiſted, *that his client could not legally reſtore the depoſit, unleſs all three proprietors were ready to receive it;* and this doctrine was good at Rome, as well as at Athens, when the thing depoſited was in its nature incapable of partition: it is alſo law, I apprehend, in Weſtminſter-hall‡

* Yelv. 4. 50. 128. † 2. Cro. 667. Wheatley and Low.

‡ D. 16. 3. 1. 36. Bro. Abr. tit. Bailment, pl. 4.

The obligation to return a depoſit faithfully was in very early times, holden ſacred by the Greeks, as we learn from the ſtory of Glaucus, (12) who on conſulting the ora-

(12) He conſulted the Delphian oracle to know if, by a falſe oath, he could ſafely withhold a depoſit, that had been intruſted to his care, from the true owner; and received the following anſwer:

'Glauk' Epikudeide, to men autika kerdion outo,
'Orko nikesai kai chremata leissasthai
'Omnu· epei thanatos ge kai euorkon menei andra.
'All' orkou pais estin anonumos, oud' epi cheires,
'Oude podes· kraipnos de meterchetai eisoke pasan
'Summarpsas olese geneen kai oikon apanta·
'Andros d' euorkou genee metopisthen ameinon.'

Terrified by this denunciation, Glaucus implored the forgiveneſs of the oracle, for haboring his deſign of perjury and fraud, but was anſwered that to *meditate* and *commit* the crime were equal degrees of turpitude. The moral of the reſponſe is juſt and *perſpicuous*; in deciding private queſtions the ancient oracles were, probably, ſeldom influenced by fear or corruption; on political occaſions, the ingenuity of the managers of the vehicle was exerciſed in framing anſwers equivocally adapted both to flatter the views of ambition, and to preſerve the credit of prophetic infallibility.

The frequency of introducing tales and fables in popular harangues among the ancients, is well known to the claſſical reader. Leutychides of Sparta, who told the ſtory in queſtion to the Athenians, to induce them to reſtore ſome hoſtages, who were ſaid to be unjuſtly detained, added, that Glaucus, though he gave up the depoſit, was puniſhed by the vengeance of the Gods The ſtory, however, failed of its intended effect, the application of the Spartan ambaſſador being unſucceſsful. The Athenians certainly did not want ſuperſtition, but they had, probably, wit enough to ſee that the ſtory was not *a caſe in point*.

The ſatire in which Juvenal introduces his illuſion to the ſtory, is replete with the moſt dignified and impreſſive morality After deſcribing the manners of an earlier and more virtuous period, he exhibits the contraſt of relaxed integrity in a modern and degenerate age:—

cle, received this answer, "that it was crim-"inal even *to harbor a thought* of withhold-"ing depositted goods from the owners, "who claimed them;"* and a fine application of this *universal* law is made by an Arabian poet contemporary with Justinian, who remarks, "that life and wealth are only "*deposited* with us by our Creator, and, *like* "*all other deposits*, must in due time be re-"stored."

Law of mandates.

II. Employment by COMMISSION was also known to our ancient lawyers, and Bracton, the best writer of them all, expresses it by the Roman word, *Mandatum;* now, as the very essence of this contract is the *gratuitous* performance of it by the bailee, and as the term *commission* is also pretty generally applied to bailees, who receive *hire* or *compensation* for their attention and trouble, I shall not scruple to adopt the word MAN-

* Herod VI. 86. Juv. Sat. XIII. 199.

"Nunc si depositum non inficietur amicus
"Si reddat veteram cum tota ærugine follem
"Prodigiosa fides"——

The punishment of guilt by the stings of conscience is finely described:

"Pœna autem vehemens, ac multo sævior illis,
"Quas et Cœditius gravis invenit aut Rhadamanthus,
"Nocte dieque suum gestara in pectore testem."

This valuable poet is, almost, the only satirist who appears to have lashed vice for the sake of virtue, and whose language preserves the consistent gravity of sincere reproof.

DATE as appropriated *in a limited ſenſe* to the ſpecies of bailment now before us; nor will any confuſion ariſe from the common acceptation of the word in the ſenſe of a judicial command or precept, which is, in truth, only a *ſecondary* and inaccurate uſage of it. The great diſtinction then between one ſort of *mandate* and a *depoſit* is, that the former *lies in feſance*, and the latter, ſimply *in cuſtody*: whence, as we have already intimated, a difference often ariſes between the degrees of care demanded in the one contract and in the other; for, the mandatary being conſidered as having engaged himſelf to uſe *a degree of diligence and attention adequate to the performance of his undertaking*, the omiſſion of ſuch diligence may be, according to the nature of the buſineſs, either *ordinary*, or *ſlight* neglect; although a bailee of this ſpecies ought regularly to be anſwerable only for a violation of *good faith*. This is the common doctrine taken from the law of Ulpian; but there ſeems, in reality, to be no exception in the preſent caſe from the general rule; for, ſince *good faith* itſelf obliges every man *to perform his actual engagements*, it of courſe obliges the mandatary to exert himſelf in proportion to the exigence of the affair in hand, and neither to *do* any thing, how minute ſoever, by which his employer may ſuſtain damage,

nor *omit* any thing, however inconſiderable, which the nature of the act requires :* nor will a want of ability to perform the contract be any defence for the contracting party ; for though the law *exacts no impoſſible things*, yet it may juſtly require that every man ſhall know his own ſtrength before he undertakes to do an act, and that, if he delude another by falſe pretenſions to ſkill, he ſhall be reſponſible for any injury that may be occaſioned by ſuch deluſion. If, indeed, an unſkilful man yield to the preſſing inſtances of his friend, who could not otherwiſe have his work performed, and engage reluctantly in the buſineſs, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

It is almoſt needleſs to add, that a mandatary, as well as a depoſitary may bind himſelf by a *ſpecial* agreement to be anſwerable even for caſualties ; but that neither the one nor the other can exempt himſelf by any ſtipulation from reſponſibility for *fraud*, or its equivalent, *groſs* neglect.

* Lord Raym 910. (22)

(22) See the case of Shiells v. Blackburne, 1 H. Black. Rep. 158, where this rule is importantly qualified by the decision, that a mandatary, not receiving any reward for his trouble, nor being by profession impliedly skilful in the business undertaken, shall not be liable to an action if he perform his commission *bona fide* and to the best of his knowledge.

A distinction seems very early to have been made in our law between the *non*feasance, and the *mis*feasance, (23) of a *conductor operis*, and, by equal reason, of a mandatary; or, in other words, between a total failure of performing an executory undertaking and a culpable neglect in executing it; for, when an action on the case was brought against a carpenter, who, having undertaken to build a new house for the plaintiff within a certain time, *had not built it*, the court gave judgment of nonsuit; but agreed, that, if the defendant had built the house negligently and spoiled the timber, an action against him would have been maintainable.* However, in a subsequent reign, when a similar action was commenced against one Watkins for *not building* a mill according to his undertaking, there was a long conversation between the judges and the bar, which Chief Justice Babington at length interrupted by ordering the defendant's counsel either to plead or to demur; but Serjeant Rolf chose to plead specially, and issue was taken on a *discharge* of the

Distinction between *non*feasance and *mis*feasance.

* Yearb. 11 Hen. IV. 33. (24)

(23) See the case of Elsee v. Gatward, 5 Term Rep. 143. where the principles upon which this distinction is founded are fully investigated.

(24) 5 Term Rep. 150.

agreement.* Juſtice Martin objected to the action, becauſe no tort was alledged; and he perſisted warmly in his opinion, which ſeems not wholly irreconcilable to that of his two brethren; for in the caſes, which they put, a ſpecial injury *was* ſuppoſed to be occaſioned by the non-performance of the contract.

Authority and reaſon both convince me, that Martin, into whoſe opinion the reporter recommends an inquiry, was wrong in his objection, if he meaned, as Juſtice Cokain and the Chief Juſtice ſeem to have underſtood him, that no ſuch action would lie for *non*feſance, even *though ſpecial damage had been ſtated.* His argument was, that the action before them *founded in covenant* merely, and required a ſpecialty to ſupport it; but that, if the covenant had been changed into a *tort*, a good writ of treſpaſs on the caſe might have been maintained: he gave, indeed, an example of *miſ*feſance, but did not controvert the inſtances, which were given by the other judges.

It was not alledged in either of the caſes juſt cited, that the defendant was to receive *pay* for the feſance of his work; but ſince both defendants were deſcribed as *actually in trade*, it was not, perhaps, intended, that

* Yearb. 3 Hen. VI. 36. b. 37. a. *Statb.* Abr. tit. *Actions ſur le cas*, pl. 20.

they were to work *for nothing*: I cannot, however, perſuade myſelf, that there would have been any difference, had the promiſes been purely *gratuituous*, and had a ſpecial injury been cauſed by the breach of them. Suppoſe, for inſtance, that Robert's cornfields are ſurrounded by a ditch or trench, in which the water from a certain ſpring uſed to have a free courſe, but which has of late been obſtructed by ſoil and rubbiſh; and that Robert informing his neighbor Henry of his intention ſpeedily to clear the ditch, Henry offers and undertakes immediately to remove the obſtruction and repair the banks *without reward*, he having buſineſs of the ſame kind to perform on his own grounds: if, in this caſe, Henry neglect to do the work undertaken, "and the "water, not having its natural courſe, over-"flow the fields of Robert and ſpoil his "corn," may not Robert maintain his action on the caſe? Moſt aſſuredly; and ſo in a thouſand inſtances of proper bailments that might be ſuppoſed, where a juſt reliance on the promiſe of the defendant prevented the plaintiff from employing another perſon, and was conſequently the cauſe of the loſs which he ſuſtained;* for it is, as it ought to be, a general rule, that, for every *damnum injuria datum*, an action of ſome ſort, which it

* Yearb. 19 Hen. VI. 49.

is the province of the pleader to adviſe, may be maintained; and although the *gratuitous* performance of an act be a *benefit* conferred, yet, according to the juſt maxim of Paulus, *Adjuvari nos, non decipi, beneficio oportet,** but the *ſpecial* damage, not the aſſumption, is the cauſe of *this* action; and, if *notice* be given by the mandatary, *before any damage incurred, and while another perſon may be employed*, that he cannot perform the work, no proceſs of law can enforce the performance of it.

A caſe in Brook, made complete from the Year-book, to which he refers, *ſeems* directly in point; for, by Chief Juſtice Fineux, *it had been adjudged*, that, "if a man "aſſume to build a houſe for me by a cer- "tain day, and do not build it, *and I ſuffer* "*damage by his nonfeſance*, I ſhall have an "action on the caſe, as well as if he had "*done it amiſs*:" but it is *poſſible*, that Fineux might ſuppoſe a conſideration, though none be mentioned.†

Actions on this contract are, indeed, very uncommon, for a reaſon not extremely flattering to human nature; becauſe it is very uncommon to undertake any office of trouble

* D. 13. 6. 17. 3.

† Bro. Abr. *tit.* Action ſur le Caſe, 72. (25)

(25) 5 Term Rep. 143.

without compensation: but, whether the case really happened, or the reward, which had actually been stipulated, was omitted in the declaration, the question "whether a man "was responsible for damage to certain "goods occasioned by his negligence in "performing a GRATUITOUS promise," came before the court, in which Lord *Holt* presided, so lately as the second year of Queen ANNE; and a point, which the first elements of the Roman law have so fully decided, that no court of judicature on the Continent would suffer it to be debated, was thought in England *to deserve*, what it certainly received, *very great consideration.**

Case of Coggs and Bernard.

The case was this: Bernard had assumed *without pay* safely to remove several casks of brandy from one cellar, and lay them down *safely* in another, but managed them so negligently, that one of the casks was staved. After the general issue joined, and a verdict for the plaintiff Coggs, a motion was made in arrest of judgment on the irrelevancy of the declaration, in which it was neither alledged, that the defendant was to have *any recompence for his pains*, nor that he was a *common porter:* but the court were

* Ld. Raym. 909—920. 1 Salk. 26. Com. 133. Farr. 13. 131. 528.

unanimouſly of opinion, that the action lay; and, as it was thought a matter of great conſequence, each of the judges delivered his opinion ſeparately.

The Chief Juſtice, as it has before been intimated,* pronounced a clear, methodical, elaborate argument; in which he diſtinguiſhed bailments into *ſix* ſorts, and gave a hiſtory of the principal authorities concerning each of them. This argument is juſtly repreſented by my learned friend, the annotator *on the Firſt Inſtitute*, as "a moſt maſterly view of the whole ſubject of bailment;"† and if my little work be conſidered merely as a commentary on it, the ſtudent may, perhaps, think, that my time and attention have not been unuſefully beſtowed.

* P. 40.

† Hargr. Co. Litt. 89 b n. 3. The profeſſion muſt lament the neceſſary ſuſpenſion of this valuable work. (26)

(26) Perhaps it may be thought ſuperfluous to intimate that the cauſe of this regret no longer exiſts, the publication alluded to having been ſince completed by Mr. Butler. The editorial labours of the learned gentleman who enjoyed the friendſhip of our author, extended to very nearly half the work, (ſee Mr. Hargrave's Addreſs to the Public, 1ſt Inſtit. 13th edition,) and it has, upon the whole, been executed ſo much to the ſatisfaction of the profeſſion, that a compariſon of the merits of the two reſpectable editors would be invidious, "et virtus tu dignus, et hic:" if the extenſive legal learning and profound reaſoning (ſometimes a little *recherche*) of Mr. Hargrave excite the admiration of the ſtudious lawyer, he cannot but reſpect the manly ſenſe and uſeful induſtry of Mr. Butler.

For the deciſion of the principal caſe, it would have been ſufficient, I imagine, to inſiſt that the point was *not new*, but had already been determined; that the writ in the Regiſter, called, in the ſtrange dialect of our forefathers, *De pipa vini carianda*,* was not ſimilar, but identical; for had the reward been the *eſſence* of the action, it muſt have been inſerted in the writ, and nothing would have been left for the declaration but the ſtating of the day, the year, and other circumſtances; of which Raſtell exhibits a complete example in a writ and declaration for *negligently and improvidently planting a quickſet hedge*, which the defendant had promiſed to raiſe, *without any conſideration alledged;* and iſſue was joined on a traverſe of the negligence and improvidence.† How any anſwer could have been given to theſe authorities, I am at a loſs even to conceive; but, although it is needleſs to prove the ſame thing twice, yet other authorities, equally unanſwerable, were adduced by the court, and ſupported with reaſons no leſs cogent; for *nothing*, ſaid Mr. Juſtice Powell emphatically, *is law, that is not reaſon;* (27) a maxim in theory excellent, but in practice

* Orig 110. a. see also 110. b. *De equo infirmo sanando columbari reparando.*

† Rast. Entr. 13. b.

(27) 2 Ld. Raym. 911.

dangerous, as many rules, true in the abſtract, are falſe in the concrete: for, ſince the reaſon of Titus may, and frequently does, differ from the reaſon of Septimius, no man, who is not a lawyer, would ever know how to act, and no man, who is a lawyer, would in many inſtances know what to adviſe, unleſs courts were bound by *authority*, as firmly as the pagan deities were ſuppoſed to be bound by the decrees of fate.

Now the *reaſon* aſſigned by the learned judge for the caſes in the Regiſter and Yearbooks, which were the ſame with Coggs and Bernard, namely, that the party's SPE-"CIAL *aſſumpſit* and undertaking obliged "him *ſo* to do the thing, that the bailor "came to no damage by his neglect," ſeems to intimate, that the omiſſion of the words *ſalvo et ſecure* would have made a difference in this caſe, as in that of a *depoſit*; but I humbly contend, that thoſe words are implied by the nature of a contract which lies in *feſance*, agreeably to the diſtinction with which I began this article. As judgment, indeed was to be given on the record merely, it was unneceſſary, and might have been improper, to have extended the propoſition beyond the point then before the court; But I cannot think that the narrowneſs of the propoſition in this inſtance affects the general doctrine, which I have preſumed to

lay down; and, in the ſtrong caſe of the ſhepherd, *who had a flock to keep*, which he *ſuffered through negligence to be drowned*, neither a *reward* nor a *ſpecial* undertaking are ſtated :* that caſe, in the opinion of Juſtice Townſend, depended upon the diſtinction between a bargain *executed* and *executory;* but I cannot doubt the relevancy of an action in the ſecond caſe, as well as the firſt *whenever actual damage is occaſioned by the nonfeſance.*† (28)

There ſeems little neceſſity after this, to mention the caſe of Powtuary and Walton, the reaſon of which applies directly to the preſent ſubject; and, though it may be objected that the defendant was ſtated as a *farrier*, and muſt be preſumed to have acted *in his trade*, yet Chief Juſtice Rolle intimates no ſuch preſumption; but ſays expreſsly, that, "an action on the caſe lies upon this "matter, *without alledging any conſideration*;

* Yearb. 2 Hen. VII. 11.

† *Statb Abr. tit. Accions ſur le cas.* pl. 11. By Juſtice Paſton, "ſi un ferrour face covenant ove moy de ferrer mon chiv-"al, jeo die que ſi l *ne ferra* mon chival, uncore jeo averai accion "ſur mon cas, qar en ſon default peraventure mon chival eſt "perie."

(28) See "Paley's Principles of Moral and Political Philoſ-"ophy," b. 3. ch. 12. where the ſubject of commissions" is concisely, but very intelligently treated. The public are much indebted to this writer for the elucidation of moral and political topics in a manner that "comes home to men's business "and bosoms."

"for the *negligence* is the cauſe of action, and "not the *aſſumpsit*"*

A bailment without reward to *carry* from place to place is very different from a mandate to *perform a work*; and, there being nothing to take it out of the general rule, I cannot conceive that the bailee is reſponſible for *leſs* than *groſs* neglect, unleſs there be a *ſpecial* acceptance: for inſtance, if Stephen deſires Philip to carry a diamond-ring from Briſtol to a perſon in London, and he put it *with bank-notes of his own* into a letter-caſe, out of which it is *ſtolen* at an inn, or ſeized by a robber on the road, Philip ſhall not be anſwerable for it; although a *very careful*, or, perhaps, a *commonly prudent* man would have kept it in his purſe at the inn, and have concealed it ſomewhere in the carriage; but, if he were to ſecrete *his own notes* with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaiſe, I think he would be bound, in caſe of a loſs by ſtealth or robbery, to reſtore the value of it to Stephen: every thing, therefore, that has been expounded in the preceding article concerning *depoſits*, may be applied exactly to *this ſort* of bailment, which may be conſidered as a ſubdiviſion of the ſecond ſpecies.

* 1 Ro. Abr. 10.

Since we have nothing in theſe caſes analogous to the judgments of *infamy*, which were often pronounced at Rome and Athens, it is hardly neceſſary to add, what appears from the ſpeech of Cicero for S. Roſcius of America, that "the ancient Romans conſidered a mandatary as *infamous*, if he broke his engagement, not only by actual *fraud*, but even by *more than ordinary negligence*."*

Exceptions to the rule.

As to *exceptions* from the rule concerning the degree of neglect, for which a mandatary is reſponſible, almoſt all that has been advanced before in the article of *depoſits*, in regard to a ſpecial convention, a voluntary offer, and an intereſt accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a work for the benefit of an abſent perſon, and *without his knowledge*, is the *negotiorum geſter* of the civilians, and the obligation reſulting from his implied contract has been incidentally mentioned in a preceding page.

* "In privatis rebus, si quis, rem *mandatam* non modo *malitiosius* gessisset, sui quæstus aut commodi causa, verum etiam *negligentius*, eum majores summum admisisse dedecus existimabant: itaque *mandati* constitutum est judicium, non minus turpe quam *furti*." Pro S. Rosc. p. 116. *Glasg.*

Law of loans for use.

III. On the third ſpecies of bailment, which is one of the moſt uſual and moſt convenient in civil ſociety, little remains to be obſerved; becauſe our own, and the Roman law are on this head perfectly coincident. I call it, after the French lawyers, *loan for uſe*, to diſtinguiſh it from their *loan for conſumption*, or the MUTUUM of the Romans; by which is underſtood the lending of *money*, *wine*, *corn*, and other things, that may be valued by number, weight, or meaſure, and are to be reſtored only in equal value or quantity:* this lattter contract, which, according to St. German, is moſt properly called a *loan*, does not belong to the preſent ſubject; but it may be right to remark, that, as the *ſpecific* things are not to be returned, the *abſolute* property of them is transferred to the borrower, who muſt bear the loſs of them, if they be deſtroyed by wreck, pillage, fire, or other ine-

* Doct. and Stud. dial. 2. ch. 38. Bract. 99. a. b. In Ld. Raym. 916. where this paſſage from Bracton is cited by the Chief Juſtice, *mutuam* is printed for *commodatam*; but what then can be made of the words *ad* IPSAM *reſtituendam*?—There is certainly ſome miſtake in the paſſage which muſt be very ancient, for the oldeſt MS that I have ſeen, is conformable to Tottel's edition. I ſuſpect the omiſſion of a whole line after the word *precium*, where the manuſcript has a full point; and poſſibly the ſentence omitted may be thus ſupplied from Juſtinian, whom Bracton copied: "At is, qui "*mutuum* accepit, obligatus remanet," ſi ſorte incendio, &c. *Inſt.* 3. 13. 2.

vitable misfortune. Very different is the nature of the bailment in queſtion; for a horſe, a chariot, a book, a greyhound, or a fowling-piece, which are lent for the uſe of the bailee, ought to be redelivered *ſpecifically;* and the owner muſt abide the loſs, if they periſh through any accident which a *very careful and vigilant man* could not have avoided. The negligence of the borrower, who alone receives benefit from the contract is conſtrued rigorouſly, and, although *ſlight*, makes him liable to indemnify the lender; nor will his incapacity to exert *more than ordinary* attention avail him on the ground of an *impoſſibility*, "which the laws, ſays "the rule, never demands;" for that maxim relates merely to things *abſolutely* impoſſible; and it was not only very *poſſible*, but very *expedient*, for him to have examined his own capacity of performing the undertaking, before he deluded his neighbor by engaging in it: if the lender, indeed, was not deceived, but perfectly knew the *quality*, as well as age, of the borrower, he muſt be ſuppoſed to have demanded no higher care than that of which *ſuch* a perſon was capable; as, if Paul lend a fine horſe to a raw youth, he cannot exact the ſame degree of management and circumſpection,

which he would expect from a riding-master, or an officer of dragoons.*

From the rule, that a borrower is answerable for *slight* neglect, compared with the distinction before made between simple *theft* and *robbery*,† it follows, that, if the borrowed goods be *stolen* out of his possession by any person whatever, he must pay the worth of them to the lender, unless he prove that they were purloined notwithstanding his *extraordinary* care. The example given by Julian, is the first and best that occurs: Caius borrows a silver ewer of Titius, and afterwards delivers it, that it may be safely restored, to a bearer of such approved fidelity and wariness, that no event could be less expected than its being stolen; if, after all, the bearer be met in the way by scoundrels, who contrive to *steal* it, Caius appears to be wholly blameless, and Titius has suffered *damnum sine injuria*. It seems hardly necessary to add, that the same care, which the bailee is bound to take of the *principal* thing bailed, must be extended to such *accessory* things as belong to it, and were delivered with it: thus a man who borrows a watch, is responsible for *slight* neglect of the chain and seals.

* *Dumoulin*, tract. *De eo quod interest*, n. 185.

† See note page 50.

Opinion of Puffendorf disputed.

Although the laws of Rome, with which thoſe of England in this reſpect agree, moſt expreſsly decide, that a borrower, uſing more than ordinary diligence, *ſhall not be chargeable, if there be a force which he cannot reſiſt** yet Puffendorf employs much idle reaſoning, which I am not idle enough to tranſcribe, in ſupport of a new opinion, namely, "that the borrower ought to indemnify "the lender, if the goods lent be deſtroyed by fire, ſhipwreck, or other inevitable accident, and *without his fault*, unleſs "*his own* periſh with them:" for example, if Paul lend William a horſe worth thirty guineas to ride from Oxford to London, and William be attacked on a heath in that road by highwaymen, who kill or ſeize the horſe, he is obliged, according to Puffendorf and his annotator, to pay thirty guineas to Paul. The juſtice and good ſenſe of the contrary deciſion are evinced beyond a doubt by M. Pothier, who makes a diſtinction between thoſe caſes, where the loan was the *occaſion* merely of damage to the lender, who might in the mean time have ſuſtained a loſs from other accidents, and thoſe, where the loan was the ſole efficient

*D. 44. 7. 1, 4. Ld. Raym. 916.

cauſe of his damage ;* as if Paul, having *lent* his horſe, ſhould be forced in the interval by ſome preſſing buſineſs to *hire* another for himſelf ; in this caſe the borrower ought, indeed, to pay for the hired horſe, unleſs the lender had voluntarily ſubmitted to bear the inconvenience *cauſed* by the loan ; for, in this ſenſe and in this inſtance, *a benefit conferred ſhould not be injurious to the benefactor.* As to a condition *preſumed* to be impoſed by the lender, that he would not abide by any loſs *occaſioned* by the lending, it ſeems the wildeſt and moſt unreaſonable of preſumptions : if Paul really intended to impoſe ſuch a condition, he ſhould have declared his mind ; and I perſuade myſelf, that William would have declined a favor ſo hardly obtained.

Cases and distinctions.

Had the borrower, indeed, been imprudent enough to leave the high road and paſs through ſome thicket, where robbers might be ſuppoſed to lurk, or had travelled in the dark at a very unſeaſonable hour, and had the horſe, in either caſe, been taken from him or killed, he muſt have indemnified the owner ; for *irreſiſtible force* is no excuſe, if a man put himſelf in the way of it by his own raſhneſs. This is nearly the caſe, cit-

* Poth. *Pret a Usage*, n. 55. Puf. with Barbeyrac,s notes, l. 5. c. 4. § 6.

ed by St. German from the Summa Rosella, where a *loan* muſt be meaned, though the word *depoſitum* be erroneouſly uſed ;* and it is there decided, that if the borrower of a horſe will imprudently ride by *a ruinous houſe in manifeſt danger of falling*, and part of it actually fall on the horſe's head, and kill him, the lender is entitled to the price of him ; but that, if the houſe were *in good condition*, and *fell* by the violence of a ſudden hurricane, the bailee ſhall be diſcharged. For the ſame, or a ſtronger reaſon, if William, inſtead of coming to London, for which purpoſe the horſe was lent, go towards Bath, or, having borrowed him for a week, keep him for a month, he becomes reſponſible for any *accident* that may befal the horſe in his journey to Bath, or after the expiration of the week.†

Thus, if Charles, in a caſe before put,‡ wear the maſked habit, and jewels of George at the ball, for which they were borrowed, and be *robbed* of them in his return home at the uſual time and by the uſual way, he cannot be compelled to pay George the value of them ; but it would be otherwiſe, if he were to go with the jewels from the theatre to a gaming-houſe, and were there to loſe them by any caſualty whatever. So,

* *Doct.* and *Stud.* where before cited.

† Ld Raym. 915. ‡ P. 57.

in the inſtance propoſed by Gaius in the Digeſt, if ſilver utenſils be lent to a man for the purpoſe of entertaining a party of friends at ſupper *in the metropolis*, and he carry them *into the country*, there can be no doubt of his obligation to indemnify the lender, if the plate be loſt by accident however irreſiſtible.

There are other caſes, in which a borrower is chargeable for *inevitable miſchance*, even when he has not, as he legally may, taken the whole riſk upon himſelf by expreſs agreement. For example, if the houſe of Caius be in flames, and he, being able to ſecure one thing only, ſave an urn of his own in preference to the ſilver ewer, which he had borrowed of Titius, he ſhall make the lender a compenſation for the loſs; eſpecially if the ewer be the more valuable, and would conſequently have been preferred, had he been owner of them both: even if his urn be the more precious, he muſt either leave it, and bring away the borrowed veſſel, or pay Titius the value of that which he has loſt; unleſs the alarm was ſo ſudden, and the fire ſo violent, that no deliberation or ſelection could be juſtly expected, and Caius had time only to ſnatch up the firſt utenſil that preſented itſelf.

Since openneſs and honeſty are the ſoul of contracts, and ſince "a ſuppreſſion of

"truth is often as culpable as an expreſs "falſehood," I accede to the opinion of M. Pothier, that, if a ſoldier were to borrow a horſe of his friend for a battle expected to be fought the next morning, and were *to conceal from him that his own horſe was as fit for the ſervice*, and if the horſe ſo borrowed were ſlain in the engagement, the lender ought to be indemnified; for probably the diſſimulation of the borrower induced him to lend the horſe; but, had the ſoldier openly and frankly acknowledged, *that he was unwilling to expoſe his own horſe*, ſince, in caſe of a loſs, he was unable to purchaſe another, and his friend, nevertheleſs, had generouſly lent him one, the lender would have run, as in other inſtances, the riſk of the day.

If the bailee, to uſe the Roman expreſſion, be IN MORA, that is, if *a legal demand* have been made by the bailor, he muſt anſwer for any caſualty that happens *after the demand;* unleſs in caſes where it may be ſtrongly preſumed, that the ſame accident would have befallen the thing bailed, even if it had been reſtored at the proper time; or, unleſs the bailee have legally tendered the thing, and the bailor have put himſelf *in mora* by refuſing to accept it: this rule extends of courſe to every ſpecies of bailment.

Controversy among the civilians.

"Whether in the case of a "*valued loan*, or where the "goods lent are *estimated at* "*a certain price*, the borrower must be con- "sidered as bound *in all events* to restore either the things lent or the value of them," is a question upon which the civilians are as much divided, as they are upon the celebrated clause in the law *Contractus*: five or six commentators of high reputation enter the lists against as many of equal fame, and each side displays great ingenuity and address in this juridical tournament. D'Avezan supports the affirmative, and Pothier the negative; but the second opinion seems the more reasonable. The word PERICULUM, used by Ulpian, is in itself equivocal; it means *hazard* in general, proceeding either from *accident* or from *neglect*; and in this latter sense it appears to have been taken by the Roman lawyer in the passage which gave birth to the dispute But, whatever be the true interpretation of that passage, I cannot satisfy myself, that, either in the *Customary Provinces* of France, or in England, a borrower can be chargeable for all events *without his consent unequivocally given*: if William, indeed, had said to Paul alternatively, "I promise, on my return to "Oxford, *either* to restore your horse *or* to "pay you thirty guineas," he must *in all*

events have performed one part of this disjunctive obligation;* but, if Paul had only said, "the horse, which I lend you for this "journey, is fairly worth thirty guineas," no more could be implied from those words, than a design of preventing any future difficulty about the price, if the horse should be killed or injured through an omission of that *extraordinary* diligence which the nature of the contract required.

Exceptions to the rule.

Besides the *general* exception to the rule concerning the degrees of neglect, namely, *Si quid convenit vel plus vel minus*, another is, where goods are lent for a use, in which the lender has *a common interest* with the borrower: in this case, as in other bailments *reciprocally* advantageous, the bailee can be responsible for no more than *ordinary* negligence; as, if Stephen and Philip invite some common friends to an entertainment prepared at their joint expence, for which purpose Philip lends a service of plate to his companion, who undertakes the whole management of the feast, Stephen is obliged only to take *ordinary* care of the plate; but this, in truth, is rather the innominate contract *do ut facias*, than a proper *loan*.

Agreeably to this principle, it must be decided, that, if goods be lent for the *sole*

* Palm. 551.

advantage of the *lender*, the borrower is anſwerable for *groſs* neglect only; as, if a paſſionate lover of muſic were to lend his own inſtrument to a player in a concert, merely to augment his pleaſure from the performance; but here again, the bailment is not ſo much a *loan*, as a *mandate*; and if the muſician were to play with all due ſkill and exertion, but were to break or hurt the inſtrument without any malice or very culpable negligence, he would not be bound to indemnify the *amateur*, as he was not in want of the inſtrument, and had no particular deſire to uſe it. If, indeed, a poor artiſt, having loſt or ſpoiled his violin or flute, be much diſtreſſed by this loſs; and a brother-muſician obligingly, though *voluntarily*, offer to lend him his own, I cannot agree with Deſpeiſſes, a learned advocate of Montpelier and writer on Roman law, that the player may be leſs careful of it than any other borrower: on the contrary, he is bound, in conſcience at leaſt, to raiſe his attention even to a higher degree; and his negligence ought to be conſtrued with rigour.

Mosaic and Attic laws.

By the law of Moſes, as it is commonly tranſlated, a remarkable diſtinction was made between the loſs of borrowed cattle or goods, happening in the *abſence*, or the *preſ-*

ence of the OWNER: for, says the divine legislator, "if a man borrow aught of his "neighbor, and it be hurt or die, *the owner* "*thereof not being with it*, he shall surely "make it good; but if the *owner* thereof *be* "with it, he shall *not* make it good:"* now it is by no means *certain*, that the original word signifies the *owner*, for it *may* signify the *possessor*, and the law *may* import, that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed; but if it was intended that the borrower should always answer for casualties, *except in the case*, which must rarely happen, of *the owner's presence*, this exception seems to prove, that no casualties were meaned, but such as *extraordinary* care might have prevented; for I cannot see, what difference could be made by the presence of the owner, if the force, productive of the injury, were wholly irresistible, or the accident inevitable.

An old Athenian law is preserved by Demosthenes, from which little can be gathered on account of its generality and the use of an ambiguous word:† it is understood by Petit as relating to guardians, mandataries,

* Exod. xxii. 14, 15.

† Peri on kathupheke tis, omoios ophiliskanein, osper an autos eche. Reisk's edition, 855, 3. Here the verb *kathuphieai* may imply *slight*, or *or inury* neglect; or even *fraud*, as Petit has rendered it.

and commiſſioners; and it is cited by the orator in the caſe of a guardianſhip. The Athenians were, probably, ſatisfied with ſpeaking very generally in their laws, and left their juries, for juries they certainly had, to decide favorably or ſeverely, according to the circumſtances of each particular caſe.

Law of pledges.

IV. As to the degree of diligence which the law requires from a *pawnee*, I find myſelf again obliged to diſſent from Sir Edward Coke, with whoſe opinion a ſimilar liberty has before been taken in regard to a *depoſitary*; for that very learned man lays it down, that, "if goods be delivered to "one as a *gage* or *pledge*, and they "be *ſtolen*, he ſhall be diſcharged, becauſe "*he hath a property* in them; and, *therefore*, "he ought to keep them *no otherwiſe than* "*his own*:"* I deny the firſt propoſition, the reaſon, and the concluſion.

Doctrine of Lord Coke denied.

Since the bailment, which is the ſubject of the preſent article, is beneficial to the *pawnee* by ſecuring the payment of his debt, *and* to the *pawner* by procuring him credit, the rule which natural reaſon preſcribes, and which the wiſdom of nations has confirmed, makes it requiſite for the perſon to whom a gage or pledge is bailed, to take

* 1 inst. 89. a. 4. Rep. 83. b.

ordinary care of it; and he muſt conſequently be reſponſible for *ordinary* neglect.* This is expreſsly holden by Bracton; and, when I rely on his authority, I am perfectly aware that he copied Juſtinian almoſt word for word, and that Lord Holt, who makes conſiderable uſe of his Treatiſe, obſerves three or four times, "that he was an "*old* author;"† but, although he had been a civilian, yet he was alſo a great common-lawyer, and never, I believe, adopted the rules and expreſſions of the Romans, except when they coincided with the laws of England in his time: he is certainly the *beſt* of our juridical claſſics; and, as to our *ancient* authors, if their doctrine be *not law*, it muſt be left to mere hiſtorians and antiquaries; but, if it remain unimpeached by any later deciſion, it is not only equally binding with the moſt recent law, but has the advantage of being matured and approved by the collected ſagacity and experience of ages.—The doctrine in queſtion has the full aſſent of Lord Holt himſelf, who declares it to be "*ſufficient*, if the pawnee uſe *true* and *ordi*-"*nary* diligence for reſtoring the goods, "and that, ſo doing, he will be indemnifi-"ed, and, notwithſtanding the loſs, ſhall

* Bract. 99. b.

† Ld. Raym. 915, 916, 919.

"resort to the pawnor for his debt." (29) Now it has been proved, that "a bailee can-"not be considered as using *ordinary* dili-"gence, who suffers the goods bailed to be "taken by *stealth* out of his custody;"* and it follows, that "a pawnee shall *not* be "discharged, if the pawn be simply *stolen* "from him;" but if he be forcibly *robbed* of it *without his fault*, his debt shall not be extinguished.

The passage in the Roman institutes, which Bracton has nearly transcribed, by no means convinces M. Le Brun, that a *pawnee* and a *borrower* are not responsible for *one and the same* degree of negligence; and it is very certain that Ulpian speaking of the *Actio pignoratitia*, uses these remarkable words: "Venit in *hac* actione et *dolus* et "*culpa* UT in *commodato*, venit et custodia; "vis major non venit." To solve this difficulty, Noodt has recourse to a conjectural emendation, and supposes UT to have been inadvertently written for AT; but if this was a mistake, it must have been pretty ancient, for the Greek translators of this sentence use a particle of similitude, not an adversative: there seems, however, no occa-

Conjectural criticism of Noodt.

* See note page 50.

(29) Ld Raym. 917.

fion for ſo hazardous a mode of criticiſm. Ulpian has not ſaid, "*talis* culpa *qualis* in "commodato;" nor does the word UT imply an *exact* reſemblance: he meaned, that a pawnee was anſwerable for *neglect*, and gave the firſt inſtance that occurred of another contract, in which the party was likewiſe anſwerable for *neglect*, but left the *ſort* or *degree* of negligence to be determined by his *general* rule; conformably to which he himſelf expreſsly mentions PIGNUS among other contracts *reciprocally uſeful*, and diſtinguiſhes it from COMMODATUM, whence the borrower *ſolely* derives advantage.*

It is rather leſs eaſy to anſwer the caſe in the Book of *Aſſiſe*, which ſeems wholly ſubverſive of my reaſoning, and, if it ſtand unexplained, will break the harmony of my ſyſtem;† for there, in an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, "that it was delivered to him *in gage* for a "certain ſum of money; that he had put it "among his other goods; and that all together had been *ſtolen* from him:" now according to my doctrine, the plaintiff might have demurred to the plea; but he was *driven* to reply, "that he *tendered* the money "before the *ſtealing*, and that the creditor

Caſe in the Book of Aſſiſe.

* Before, p. 17, 18. † 29 Aſs. pl. 28.

" refuſed to accept it," on which fact iſſue was joined; and the reaſon aſſigned by the Chief Juſtice was, that, " if a man bail goods " to me to keep, and I put them among my " own, I ſhall not be charged if they be " *ſtolen*." To this caſe I anſwer: firſt, that, if the court really made no difference between a *pawnee* and a *depoſitary*, they were indubitably miſtaken; for which aſſertion I have the authority of Bracton, Lord Holt, and St. German, who ranks the taker of a *pledge* in the ſame claſs with a *hirer* of goods;* next, that in a much later caſe, in the reign of Hen. VI. where a *hiring of cuſtody* ſeems to be meaned, the diſtinction between a *theft* and a *robbery* is taken agreeably to the Roman law;† and, laſtly, that, although in the ſtrict propriety of our Engliſh language, to *ſteal* is to take *clandeſtinely*, and to *rob* is to ſeize by *violence*, correſponding with the Norman verbs *embleer* and *robber*, yet thoſe words are ſometimes uſed inaccurately; and I always ſuſpected, that the caſe in the Book of Aſſiſe related to a *robbery*, or a taking *with force*; a ſuſpicion confirmed beyond any doubt by the judicious Brook, who abridges this very caſe with the following title in the margin, " Que ſerra al perde, quant leſs biens ſont

* Doct. and Stud. dial 2 ch. 38.

† Before, p. 50. see note.

"* *robbes*:"* and in a modern work, where the old cafes are referred to, it appears to have been fettled, in conformity to them and to reafon, "that if the pawn be laid up, "and the pawnee be *robbed*, he fhall not be "anfwerable:"† but Lord Coke feems to have ufed the word *ftolen* in its proper fenfe, becaufe he plainly compares a pawn with a depofit.

If, indeed, the thing pledged be taken *openly* and *violently* through the *fault* of the pledgee, he fhall be refponfible for it; and, after a *tender* and *refufal* of the money owed, which are equivalent to actual *payment*, *the whole property is inftantly revefted in the pledgor*, and he may confequently maintain an action of trover:‡ it is faid in a moft ufeful work, that by fuch tender and refufal, the thing pawned "ceafes to be a pledge, "and becomes a *depofit*;"§ but this muft be an error of impreffion; for there can never be a *depofit* without the owner's conſent, and a *depofitary* would be chargeable only for *grofs* negligence, whereas the pawnee, whofe fpecial property is determined

* Abr *tit.* Bailment, pl 7. † 2 Saik. 522.

‡ 29 Ass. pl. 28. Yelv. 179. Ratcliff and Davis.

§ Law of *Nifi Prius*, 72. (30)

(30) In the subsequent editions of that work, the words, "*and becomes a depofit*" are omitted.

by the wrongful detainer, becomes liable *in all poſſible events* to make good the thing loſt, or to relinquiſh his debt.*

Lord Coke's reasons contested.

The reaſon given by Coke for his doctrine, namely, "becauſe the pawnee has "a *property* in the goods pledged," is applicable to every other ſort of bailment, and proves nothing in regard to any *particular* ſpecies; for every bailee has a temporary *qualified* property in the things of which poſſeſſion is delivered to him by the bailor, and has, therefore, a poſſeſſory action or an appeal in his own name againſt any ſtranger who may damage or purloin them.† By the Roman law, indeed, "even the poſſeſ- "ſion of the depoſitary was holden to be "that of the perſon depoſiting;" but with us the general bailee has unqueſtionably a *limited* property in the goods intruſted to his care: he may not, however, *uſe* them on any account without the conſent of the owner, either expreſsly given, if it can poſſibly be obtained, or at leaſt ſtrongly preſumed; and this preſumption varies, as the thing is likely to be better, or worſe, or not at all affected, by uſage; ſince, if Caius depoſit a *ſetting-dog* with Titius, he can hardly be ſuppoſed unwilling that the dog ſhould be uſed for partridge-ſhooting, and thus be

* Ld. Raym. 917. † Yearb 21 Hen. VII. 14. b. 15. a.

confirmed in thoſe habits which make him valuable: but, if *clothes* or *linen* be depoſited by him, one can ſcarce imagine that he would ſuffer them to be worn; and on the other hand it may juſtly be inferred, that he would gladly indulge Titius in the liberty of uſing the *books* of which he had the cuſtody, ſince even moderate care would prevent them from being injured. In the ſame manner it has been holden, that the pawnee of goods, which will be *impaired* by uſage, cannot uſe them; but it would be otherwiſe, I apprehend, if the things pawned actually *required* exerciſe and a continuance of habits, as ſporting-dogs and horſes: if they cannot be hurt by being worn, they may be uſed, but *at the peril* of the pledgee; as, if chains of gold, ear-rings, or bracelets, be left in pawn with a lady, and ſhe wear them at a public place, and be *robbed* of them on her return, ſhe muſt make them good:— "if ſhe keep them in a bag," ſays a learned and reſpectable writer, "and they are *ſtolen*, ſhe ſhall not be charged;"* but the bag could hardly be taken *privately* and *quietly* without her omiſſion of *ordinary* diligence; and the manner in which Lord Holt puts the caſe eſtabliſhes my ſyſtem, and confirms the anſwer juſt offered to the caſe from the Year-book; for, "if ſhe keep the jewels,"

* Law of Niſi prius, 72.

ſays he, "*locked up* in her cabinet, and her "cabinet be *broken open*, and the jewels tak-"en thence, ſhe will not be anſwerable."* Again; it is ſaid, that where the pawnee is at any expence to maintain the thing given in pledge, as, if it be a horſe or a cow, he may ride the horſe moderately, and milk the cow regularly, by way of compenſation for the charge;† and this doctrine muſt be equally applicable to a general bailee, who ought neither to be injured nor benefitted in any reſpect by the truſt undertaken by him; but the Roman and French law, more agreeably to principle and analogy, permits indeed both the pawnee and the depoſitary to milk the cows delivered to them, but requires them to account with the reſpective owners for the value of the milk and calves, deducting the reaſonable charges of their nouriſhment.‡ It follows from theſe remarks, that Lord Coke has aſſigned an inadequate reaſon for the degree of diligence which is demanded of a pawnee; and the true reaſon is, that the law requires nothing *extraordinary* of him.

But if the receiver in pledge *were* the only bailee who had a *ſpecial property* in the thing bailed, it could not be logically inferred, "that, *therefore*, he ought to keep it

* Ld. Raym. 917. † Ow. 124.

‡ Poth. *Depot*, n. 47. *Nantiſſement*, n. 35.

"merely *as his own*:" for, even if Caius have an *absolute* undivided property in goods, jointly or in common with Septimius, he is bound by rational, as well as positive law, to take *more* care of them *than of his own*, unless he be in fact a prudent and thoughtful manager of his own concerns: since every man ought to use *ordinary* diligence in affairs which interest *another* as well as himself: "*Aliena* negotia," says the emperor Constantine, "*exacto* officio geruntur."*

The conclusion, therefore, drawn by Sir Edward Coke, is no less illogical than his premises are weak; but here I must do M. Le Brun the justice to observe, that the argument, on which his whole system is founded, occurred likewise to the great oracle of English law; namely, that a person who had a *property* in things committed to his charge, was only obliged to be *as careful of them as of his own* goods; which may be very true, if the sentence be predicated of a man *ordinarily* careful of his own; and, if that was Le Brun's hypothesis, he has done little more than adopt the system of Godefroi, who exacts *ordinary* diligence from a *partner*, and a *co-proprietor*, but requires a *higher* degree in eight of the ten preceding contracts.

* C. 4. 35. 21.

Pledges for debt are of the higheſt antiquity: they were uſed in very early times by the roving Arabs, one of whom finely remarks, "that the life of Man is no more "than a *pledge* in the hands of Deſtiny;"(31) and the ſalutary laws of Moſes, which forbade certain implements of huſbandry and a widow's raiment to be given in pawn, deſerve to be imitated as well as admired.—The diſtinction between *pledging*, where poſſeſſion is transferred to the creditor, and *hypothecation*, where it remains with the debtor, was originally Attic; but ſcarce any part of the Athenian laws on this ſubject can be gleaned from the ancient orators, except what relates to bottomry in five ſpeeches of Demoſthenes.

Turkiſh law. I cannot end this article without mentioning a ſingular caſe from a curious manuſcript at Cambridge, which contains a collection of queries in Turkiſh, together with the deciſions or conciſe anſwers of the Mufti at

(31) This ſentiment is peculiarly oriental: it is naturally ſuggeſted by the hazardous viciſſitudes which attend the purſuits of the wandering Arab. Under its *religious* influence, the believers in Mahomet have fiercely encountered the dangers of battle, or have ſupinely fallen by the ravages of the plague; it has tolerated the horrors of a bloody and degrading deſpotiſm, and it ſupplies the "*carpe diem*" in the voluptuous effuſions of the Eaſtern poets. The moral it contains is more properly applied, and very pathetically dilated, in the Book of Job.

Conſtantinople; it is commonly imagined, that the Turks have a tranſlation in their own language of the Greek code, from which they have ſupplied the defects of their Tartarian and Arabian juriſprudence;* but I have not met with any ſuch tranſlation, although I admit the conjecture to be highly probable, and am perſuaded, that their numerous treatiſes on Mahomedan law are worthy, on many accounts, of an attentive examination. The caſe was this, "Zaid had "left with Amru divers goods in pledge for "a certain ſum of money, and ſome *ruffians*, "having entered the houſe of Amru, took "away his own goods together with thoſe "pawned by Zaid." Now we muſt neceſſarily ſuppoſe, that the creditor had by *his own fault*, given occaſion to this robbery; otherwiſe we may boldly pronounce, that the Turks are wholly unacquainted with the imperial laws of Byzantium, and that their own rules are totally repugnant to natural juſtice; for the party proceeds to aſk, "whether, *ſince the debt became extinct by the "loſs of the pledge*, and ſince the goods pawned exceeded in value the amount of the "debt, Zaid could legally demand the balance of Amru;" to which queſtion the great law-officer of the Othman court anſwered with the brevity uſual on ſuch

* *Duck.* de Auct. Jur. Civ. Rom. I. 2. 6.

occaſions. Olmaz, *it cannot be.** This cuſtom, we muſt confeſs, of propoſing caſes both of law and conſcience under *feigned* names to the ſupreme judge, whoſe anſwers are conſidered as ſolemn *decrees*, is admirably calculated to prevent partiality, and to ſave the charges of litigation.

Law of hiring.

V. The laſt ſpecies of bailment is by no means the leaſt important of the five, whether we conſider the infinite convenience and daily uſe of the contract itſelf, or the variety of its branches, each of which ſhall now be ſuccinctly, but accurately, examined.

Hiring of a THING.

1. *Locatio*, or *locatio-conductio*, REI, is a contract by which the hirer gains a tranſient qualified property in the *thing* hired, and the owner acquires an abſolute property in the ſtipend, or price, of the hiring; ſo that, in truth, it bears a ſtrong reſemblance to the contract of *emptio-venditio*, or SALE; and, ſince it is advantageous to *both* contracting parties, the harmonious conſent of nations will be interrupted, and one object of this Eſſay defeated, if the laws of England ſhall be found, on a fair inquiry, to demand of the hirer a *more than ordinary*

* Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton. LL. Hywel Dda lib 2. cap. 2. § 29. *note* x. It may *possibly* be the usage in Turkey to *stipulate* "ut amissio pignoris liceret de bitorem," as in C. 4. 24. 6.

degree of diligence. In the moſt recent publication that I have read on any legal ſubject, it is expreſsly ſaid, "that the hirer "is to take *all imaginable* care of the goods "delivered for hire :"* the words *all imaginable*, if the principles before eſtabliſhed be juſt, are too ſtrong for practice even in the ſtrict caſe of *borrowing* ; but, if we take them in the mildeſt ſenſe, they muſt imly an *extraordinary* degree of care ; and this doctrine, I preſume, is founded on that of Lord Holt in the caſe of Coggs and Bernard, where the great judge lays it down, "that, if "goods are let out for a *reward*, "the *hirer* is bound to the UTMOST dili- "gence, ſuch as the MOST *diligent father of a* "*family uſes*."† It may ſeem bold to controvert ſo reſpectable an opinion : but, without inſiſting on the palpable injuſtice of making a *borrower* and a *hirer* anſwerable for preciſely the *ſame* degree of neglect, and without urging that the point was not then before the court, I will engage to ſhow, by tracing the doctrine up to its real ſource, that the *dictum* of the Chief Juſtice was entirely grounded on a grammatical miſtake in the tranſlation of a ſingle Latin word.

Lord Holt's doctrine explained.

* Law of Nisi Prius, 3d edition corrected, 72.

† Ld. Raym. 916.

In the first place, it is indubitable that his lordship relied *solely* on the authority of Bracton; whose words he cites at large, and immediately subjoins, "*whence it appears, &c.*" now the words "talis ab eo "desideratur custodia, qualem DILIGENTIS-"SIMUS *paterfamilias* suis rebus adhibet," on which the whole question depends, are copied exactly from Justinian,* who informs us in the *proeme* to his Institutes, that his decisions in that work were extracted *principally from the Commentaries of* Gaius; and the epithet *diligentissimus* is in fact used by this ancient lawyer,† *and by him alone*, on the subject of hiring: but Gaius is remarked for writing with energy, and for being fond of using *superlatives* where all other writers are satisfied with *positives*;‡ so that his forcible manner of expressing himself, in this instance as in some others, misled the compilers employed by the Emperor, whose words Theophilus rendered more than literally, and Bracton transcribed; and thus an epithet which ought to have been translated *ordinarily* diligent, has been supposed to mean *extremely* careful. By rectifying this mistake, we restore the broken harmony of the *Pandects*

* Bract 62. b. Justin. Inst. 3. 25. 5. where Theophilus has *sophodra epimeleetatos*.

† D. 19. 2. 25. 7. ‡ Le Brun. p. 93.

with the *Inſtitutes*, which, together with the *Code*, form *one connected work*,* and, when properly underſtood, explain and illuſtrate each other; nor is it neceſſary, I conceive, to adopt the interpretation of M. De Ferriere, who imagines, that both Juſtinian and Gaius are ſpeaking only of caſes, which *from their nature*, demand *extraordinary* care.†

There is no authority then againſt the rule, which requires of a *hirer* the ſame degree of diligence that *all prudent men*, that is, *the generality of mankind*, uſe in keeping their own goods; and the juſt diſtinction between *borrowing* and *hiring*, which the Jewiſh lawgiver emphatically makes, by ſaying, "if it be an hired thing, *it came for* "*its hire*,"‡ remains eſtabliſhed by the concurrent wiſdom of nations in all ages. Rules and remarks.

If Caius, therefore, hire a horſe, he is bound to ride it as moderately and treat it as carefully, as any man of *common diſcretion* would ride and treat his own horſe; and if, through his negligence, as by leaving the door of his ſtable open at night, the horſe be *ſtolen*, he muſt anſwer for it; but not, if he be *robbed* of it by highwaymen, unleſs by his imprudence he gave occaſion to the

* Burr. 426. † *Inſt.* vol. v. p. 138.

‡ Exod. xxii. 15.

robbery, as by travelling at unuſual hours, or by taking an unuſual road: if, indeed, he hire a carriage and any number of horſes, and the owner ſend with them his poſtilion or coachman, Caius is diſcharged from all attention to the horſes, and remains obliged only to take ordinary care of the glaſſes and inſide of the carriage, while he ſits in it.

Since the negligence of a ſervant, *acting under his maſter's directions, expreſs or implied*, is the negligence of the maſter, it follows, that, if the *ſervant* of Caius injure or kill the horſe by riding it immoderately, or by leaving the ſtable door open, ſuffer thieves to ſteal it, Caius muſt make the owner a compenſation for his loſs;* and it is juſt the ſame if he take a ready-furniſhed lodging, and his gueſts, or ſervants, while they act under the authority given by him, damage the furniture by the omiſſion of ordinary care. At Rome the law was not quite ſo rigid; for Pomponius, whoſe opinion on this point was generally adopted, made the maſter liable only *when he was culpably negligent in admitting careleſs gueſts or ſervants*, whoſe bad qualities he ought to have known:† but this diſtinction muſt have been perplexing enough in practice; and the rule which, by making the head of a family anſwerable indiſcriminately for the

* Salk. 282. Ld. Raym. 916. † D. 19. 2. 11.

faults of those whom he receives or employs, compels him to keep a vigilant eye on all his domestics, is not only more simple, but more conductive to the public security, although it may be rather harsh in some particular instances.* It may here be observed, that this is the only contract to which the French, from whom our word *bailment* was borrowed, apply a word of the same origin; for the letting of a house or chamber for hire, is by them called *bail a loyer*, and the latter for hire, *bailleur*, that is *bailor*, both derived from the old verb *bailler*, to deliver; and though the contracts which are the subject of this Essay, be generally confined to *moveable* things, yet it will not be improper to add, that, if *immoveable* property, as an orchard, a garden, or a farm, be letten by parol, with no other stipulation than for the price or rent, the lessee is bound to use the same diligence (32) in preserving

* Poth. Louage, n. 193.

(32) It should seem that upon a similar principle the Chief Justice, in the case of Cheetham v. Hampson, 4 Term Rep. 319, observes, "It is so notoriously the duty of the actual occupier to *repair the fences*, and so little the duty of the landlord, that, *without any agreement to that effect*, the landlord may maintain an action against the tenant for not so doing upon the ground of the injury done to the inheritance."—See also the case of Powley v. Walker, 5 Term Rep. 373, in which it was decided that the "*mere relation* of landlord and tenant" was a consideration to entitle the plaintiff to recover damages in an action of assumpsit "for not managing a farm in an husbandlike manner."

the trees, plants, or implements, that *every prudent perſon* would uſe, if the orchard, garden, or farm, were his own.

Hiring of WORK.

2. *Locatio* OPERIS, which is properly ſubdiviſible to two branches, namely, *faciendi*, and *mercium vehendarum*, has a moſt extenſive influence in civil life; but the principles, by which the obligations of the contracting parties may be aſcertained, are no leſs obvious and rational, than the objects of the contract are often vaſt and important.*

If Titius deliver ſilk or velvet to a tailor for a ſuit of clothes, or a gem to a jeweller to be ſet or engraved, or timber to a carpenter for the rafters of his houſe, the tailor, the engraver, and the builder, are not only obliged to perform their ſeveral undertakings in a workmanly manner,† but *ſince they are entitled to a reward*, either by expreſs

* It may be useful to mention a nicety of the Latin language in the application of the verbs *Locare* and *conducere*; the employer, who gives the reward, is *locator operis*, but *conductor operarum*; while the party employed, who receives the pay, is *locator operarum*, but *conductor operis*. Heinecc. in Pand. par. 3. § 320. So, in Horace,

"Tu secanda marmora
"*Locas*"—

which the stonehewer or mason *conduxit*.

† 1 Venir. 268 erroneously printed *Vern.* 268. in all the editions of Bl. Com. ii. 452. The innumerable multitude of inaccurate or idle references in our best reports and law-tracts, is the bane of the student and of the practiser.

bargain or by implication, they muſt alſo take *ordinary* care of the things reſpectively bailed to them: and thus, if a horſe be delivered either to an agiſting farmer for the purpoſe of depaſturing in his meadows, or to an hoſtler to be dreſſed and fed in his ſtable, the bailees are anſwerable for the loſs of the horſe, if it be occaſioned by the *ordinary* neglect of themſelves or their ſervants. It has, indeed, been adjudged, that, if the horſe of a gueſt be ſent *to paſture* by *the owner's deſire*, the innholder is not, as *ſuch*, reſponſible for the loſs of him by *theft* or accident;* and in the caſe of Moſley and Foſſet, an action againſt an agiſter for keeping a horſe *ſo negligently that it was ſtolen*, is ſaid to have been held maintainable *only* by reaſon of a *ſpecial* aſſumption;† but the caſe is differently reported by Rolle, who mentions no ſuch reaſon; and, according to him, Chief Juſtice Popham advanced generally, in conformity to the principles before eſtabliſhed, that, "if a man, to "whom horſes are bailed for agiſtment, "*leave open the gates of his field*, in conſe- "quence of which neglect they ſtray and "are *ſtolen*, the owner has an action againſt "him:" it is the ſame if the innkeeper ſend

*8 Rep. 32. Cayle's caſe. †Mo. 543. 1 Ro. Abr. 4.

Law concerning innholders.

his gueſt's horſe to a meadow *of his own accord*, for he is bound to keep ſafely all ſuch things as his gueſts depoſit *within his inn*, (33) and ſhall not diſcharge himſelf by his own act from that obligation; and even when he turns out the horſe *by order of the owner*, and receives pay for his graſs and care, he is chargeable, ſurely, for *ordinary* negligence, as *a bailee for hire*, though not *as an innkeeper* by the general cuſtom of the realm. It may be worth while to inveſtigate the reaſons of this *general cuſtom*, which, in truth, means no more than *common law*, concerning innholders.*

Although a ſtipend or reward in *money* be the eſſence of the contract called *locatio*, yet the ſame reſponſibility for neglect is juſtly demanded in any of the *innominate* contracts, or whenever a valuable conſideration of any kind is given or ſtipulated.—

* Reg. Orig. 105. 4 Noy. Max. ch. 43.

(33) "Although the guest doth not deliver his goods to the "innkeeper to keep," is the doctrine laid down in Gayle's Case, 8 Rep. 36. § 4. The law of this case was recognized in Bennet v. Mellor, 5 Term Rep. 273, where it was determined that "if an innkeeper refuse to take charge of goods till a room may "be made ready, and in the mean time, because his house is full of parcels, still he is liable to make "good the loss if the owner stop as a *guest*, and the goods be "stolen during his stay." This latter case was so peculiarly circumstanced, as to produce the individual hardship, which sometimes occurs in the necessarily rigorous construction of laws founded on principles of public policy.

This is the caſe where the contract *do ut des* is formed by a *reciprocal bailment for uſe*; as if Robert permit Henry to uſe his *pleaſture-boat* for a day, *in conſideration* that Henry will give him the uſe of his *chariot* for the ſame time; and ſo in ten thouſand inſtances, that might be imagined, of *double bailments*: this too is the caſe if the *abſolute* property of one thing be given as an equivalent for the *temporary* or limited property of another, as if Charles give George a brace of pointers for the uſe of his *hunter* during the ſeaſon. The ſame rule is applicable to the contract *facio ut facias*, where two perſons agree to perform *reciprocal works*; as if a maſon and a carpenter have each *reſpectively* undertaken to build an edifice, and they mutually agree, that the firſt ſhall finiſh all the maſonry, and the ſecond all the woodwork, in their reſpective buildings; but, if a goldſmith make a bargain with an architect to give him a quantity of wrought plate for building his houſe, this is the contract *du ut facias*, or *facio ut des*; and in all theſe caſes, the bailees muſt anſwer for the omiſſion of *ordinary* diligence in preſerving the things with which they are intruſted: ſo, when Jacob undertook the care of Laban's flocks and herds for no leſs a reward than his younger daughter, whom he loved ſo paſſionately, *that ſeven years were in his*

eyes like a few days, he was bound to be juſt as vigilant as if he had been paid in ſhekels of ſilver.

Now the obligation is preciſely the ſame, as we have already hinted,* when a man takes upon himſelf the cuſtody of goods *in conſequence and in conſideration of another gainful contract*; and though an innholder be not paid in *money* for ſecuring the traveller's trunk, yet the gueſt *facit ut faciat*, and alights at the inn, not ſolely for his own refreſhment, but alſo that his goods may be ſafe: independently of this reaſoning, the cuſtody of the goods may be conſidered as *acceſſary* to the principal contract, and the money paid for the apartments as extending to the care of the box or portmanteau; in which light *Gaius* and, as great a man as he, Lord *Holt*, ſeem to view the obligation; for they agree, "that, although a bargeman "and a maſter of a ſhip receive their fare "for the paſſage of travellers, and an inn-"keeper his pay for the accommodation and "entertainment of them, but have no pecu-"niary reward for the *mere cuſtody* of the "goods belonging to the paſſengers or "gueſts, yet they are obliged to take *ordi-"nary* care of thoſe goods; as a fuller and "a mender are paid for their *ſkill only*, yet "are anſwerable, *ex locato*, for *ordinary* neg-

* P 56.

"left, if the clothes be lost or damaged."*

In whatever point of view we consider this bailment, no more is *regularly* demanded of the bailee than the care which *every prudent* man takes of his own property; but it has long been holden, that an *innkeeper* is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through one of his agents, be damaged *in his inn*, or *stolen out of it* by *any person whatever*:† nor shall he discharge himself from this responsibility by a refusal to take any care of the goods, *because there are suspected persons in the house for whose conduct he cannot be answerable*:‡ it is otherwise, indeed, if he refuse admission to a traveller because he really has no room for him, and the traveller, nevertheless, insist upon entering, and place his baggage in a chamber without the keeper's consent.‖

Add to this, that, if he fail to provide honest *servants* and honest *inmates*, according to the confidence reposed in him by the public, his negligence in that respect is highly culpable, and he ought to answer *civilly* for their acts, even if they should *rob* the guests who sleep in his chambers.§— Rigorous as this law may seem, and hard

* D. 4. 9. 5. and 12 Mod. 487.

† Yeamb. 10 Hen. VII. 26. 2 Cro. 89. ‡ Mo. 78.

‖ Dy. 158. b. 1 And. 29. §1. Bl. Comm. 430.

as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield; for travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their *negligence*, if no actual fraud had been committed by them. Hence the Prætor declared, according to Pomponius, *his desire of securing the public from the dishonesty of such men*, and by his *edict* gave an action against them, if the goods of travellers or passengers were lost or hurt by any means, except *damno fatali* or by *inevitable accident*; and Ulpian intimates, that even this severity could not restrain them from knavish practices or suspicious neglect.*

* D. 4. 9. 1 and 3. (34.)

(34.) The comment, and the complaint, of Ulpian are thus expressed. "Maxima utilitas est hujus edicti: quia necesse "est plerumque eorum fidem sequi, et res custodiæ eorum com- "mittere. Neque qui quam putet graviter hoc adversus eos "constitutum: *nam est in ipsorum arbitrio, ne quem recipiant*, "et nisi hoc esset statutum, materia daretur cum furibus, ad- "versus eos quos recipiunt, coeundi: cum ne nunc quidem ab-

In all such cases, however, it is competent for the innholder to repel the *presumption* of his knavery or default, by *proving* that he took *ordinary* care, or that the *force*, which occasioned the loss or damage, was truly irresistible.

When a private man demands and receives a compensation for the *bare custody* of goods in his warehouse or store room, this is *not* properly a *deposit*, but a *hiring of care and attention*: it may be called *locatio custodiæ*, and might have been made a distinct branch of this last sort of bailment, if it had not seemed useless to multiply subdivisions; and the bailee may still be denominated *locator operæ*, since the *vigilance and care*, which he *lets out* for pay, are in truth a mental *operation*. Whatever be his appellation, either in English or Latin, he is clearly responsible, like other interested bailees, for *ordinary* negligence, and although St. German seems to make no difference in this respect between *a keeper of goods for hire* and *a simple depositary*, yet he uses

Remarks on St. German.

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9 stineant hujusmodi fraudibus." It will be obvious that the part of Ulpian's reason "*nam est*" &c. includes an opinion of receiving or refusing guests, in which the Roman *cauponæ* differed from our modern innkeepers, the latter being liable to an action if they refuse, without an adequate reason, to admit and accommodate a traveller. Black. Com. vol. 3. p. 164. 5 Term Rep. 276.

the word DEFAULT, like the CULPA of the Romans, as a generical term, and leaves the *degree* of it to be aſcertained by the rules of law.*

In the ſentence immediately following, he makes a very material diſtinction between the two contracts; for, "if a man," ſays he, "have *a certain recompence* for the "keeping of goods, and promiſe, at the "time of delivery, *to redeliver them ſafe at* "*his peril*, then he ſhall be charged with *all* "*chances* that may befall; but if he make "*that* promiſe, and *have nothing* for keep-"ing them, he is bound to *no caſualties* (35) "but ſuch as are wilful, and happen *by his* "*own default*:" now the word PERIL, like *periculum*, from which, it is derived, is in itſelf ambiguous, and ſometimes denotes the *riſk* of *inevitable miſchance*, ſometimes the *danger* ariſing from *a want of due circumſpection*; and *the ſtrongeſt ſenſe* of the word *was taken* in the firſt caſe *againſt him who uttered it*; but in the ſecond, where the conſtruction is favourable, the *milder* ſenſe was juſtly preferred.† Thus when a perſon, who, if he were wholly *unintereſted*, would be a *mandatary*, undertakes for a *reward* to per-

* Doct and Stud where before cited.

† See before, p. 51.

(35) See "*Garside* v. *the Proprietors of the Trent and Mercey Navigation*," 4 Term Rep. 389.

form *any work*, he must be considered as bound still more strongly *to use a degree of diligence adequate to the performance of it*: his obligation must be rigorously construed, and he would, perhaps, be answerable for *slight* neglect, where no more could be required of a *mandatary* than *ordinary* exertions. This is the case of commissioners, factors, and bailiffs, when their undertaking *lies in fesance*, and not simply in *custody*: hence as peculiar care is demanded in removing and raising a fine column of granite or porphyry, without injuring the shaft of the capital, Gaius seems to exact *more than ordinary* diligence from the undertaker of such a work for a stipulated compensation.* Lord Coke considers a factor in the light of a *servant*, and thence deduces his obligation; but, with great submission, his *reward* is the true reason, and *the nature of the business* is the just measure of his duty:† which cannot, however, extend to a responsibility for *mere accident* or *open robbery*;‡ and even in the case of *theft*, a factor has been holden excused when he shewed "that he had *laid up* the "goods of his principal in a ware house,

Law concerning factors and traders

* D. 19. 2. 7. † 4 Rep. 84. Ld. Raym. 918.

‡ 1 Inst. 89. a.

"out of which they were *ſtolen* by certain "malefactors to him unknown."*

Where *skill* is required, as well as *care*, in performing the work undertaken, the bailee for *hire* muſt be ſuppoſed to have engaged himſelf for *a due application of the neceſſary art*: it is his own fault if he undertake a work above his ſtrength; and all that has before been advanced on this head concerning a *mandatary*, may be applied with much greater force to a *conductor operis faciendi*.† I conceive, however, that, where the bailor has not been deluded by any but himſelf, and voluntarily employs in one art a man who openly exerciſes another, his folly has no claim to indulgence; and that, unleſs the bailee make falſe pretenſions, or a *ſpecial* undertaking, no more can fairly be demanded of him than the beſt of his ability.‡ The caſe which Sadi relates with elegance and humor in his Guliſtan or Roſe-garden, and which Puffendorf cites with approbation,‖ is not inapplicable to the preſent ſubject, and may ſerve as a ſpecimen of Mahomedan law, which is not ſo different from ours as we are taught to im-

* 1 Vent. 121. Vere and Smith.

† *Spondes* ſay the Roman lawyers, *peritiam artis*.

‡ P. 63. ‖ De Jure Nat. et Gent. lib. 5. cap. 5 § 3.

agine: 'A man who had a dis- Mahomedan law.
'order in his eyes, called on a
'*farrier* for a remedy; and he
'applied to them a medicine commonly uſed
'for *his* patients: the man loſt his ſight,
'and brought an action for damages; but
'the judge ſaid, "No action lies, for if the
"complainant had not himſelf been an *aſs*,
"he would never have employed a *farrier*;"
and Sadi proceeds to intimate, that "if a
"perſon will employ a common *mat-maker*
"to weave or embroider *a fine carpet*, he
"muſt impute the bad workmanſhip to his
"own folly."*

In regard to the diſtinction before-mentioned between the *non*-feſance and the *miſ*-feſance of a workman,† it is *indiſputably* clear, that an action lies in *both* caſes for a reparation in damages, whenever the work was undertaken for a *reward*, either actually paid, *expreſsly* ſtipulated, or in the caſe of a *common* trader, ſtrongly *implied*; of which Blackſtone gives the following inſtance: "If a *builder* promiſes, undertakes or as-

* Rosar. Polit. cap. 7. There are numberleſs tracts in Arabic, Perſian, and Turkiſh, on every branch of jurisprudence; from the beſt of which it would not be difficult to extract a complete ſyſtem, and to compare it with our own; nor would it be leſs eaſy to explain in Perſian or Arabic ſuch parts of our Engliſh law, as either coincide with that of the Aſiatics, or are manifeſtly preferable to it.

† P. 63, &c.

"sumes to Caius, that he will build and "cover his house within a time limited, and "fails to do it, Caius has an action on the "case against the builder for this breach of "his express promise, and shall recover a "pecuniary satisfaction for the injury sus-"tained by such delay."* The learned author meaned, I presume, a *common* builder, (36) or supposed a *consideration* to be given; and for this reason I forbear to cite his doctrine as in point on the subject of an action for the *non*-performance of a *mandatary*.†

* 3 Comm. 157. † P. 65, 66, 70, 71.

(36) See "Elsee v. Gatward," 5 Term Rep. 150. The first count of the declaration in that case and upon which it principally turned, alleged, that the defendant, who was a carpenter, was retained by the plaintiffs to build and repair certain houses, but it was not stated that he was to receive *any consideration*, or that he *entered upon* his work. Lord Kenyon observed, "no "consideration results from the defendant's situation as a car-"penter nor is he bound to perform all the work that is ten-"dered to him." Mr Justice Ashhurst in giving his opinion on the same case, remarked the following distinctions: "If a "party undertake to perform work, and proceed on the employ-"ment, he makes himself liable for any *misfesance* in the "course of that work: but, if he undertake and do not pro-"ceed on the work, no action will lie against him for the "*nonfesance*.—In this case the defendant's undertaking was "merely voluntary, no consideration for it being stated.—"There was no custom of the realm, or any legal obligation "to compel him to perform this work, and that distinguishes "this case from those of a *common* carrier, porter, and ferry-"man, *who are bound by their situations in life* to perform the "work tendered to them; but *a carpenter*, as such, is not bound "by any such obligation."

Rules and distinctions.

Before we leave this article, it ſeems proper to remark, that every bailee for *pay* whether *conductor rei* or *conductor operis*, muſt be ſuppoſed to know, that the goods and chattels of his bailor are in *many* caſes *diſtrainable* for rent, if his landlord, who might otherwiſe be ſhamefully defrauded, find them on the premiſes;* and as they cannot be diſtrained and ſold without his *ordinary* default *at leaſt*, the owner has a remedy over againſt him, and muſt receive a compenſation for his loſs:† even if a *depoſitary* were to remove or conceal *his own* goods, and thoſe of his depoſitor were to be ſeized for rent-arrere, he would unqueſtionably be bound to make reſtitution; but there is no obligation in the bailee to *ſuggeſt wiſe precautions againſt inevitable accident*; and he cannot, therefore, be obliged *to adviſe inſurance from fire*; much leſs *to inſure* the things bailed without an authority from the bailor.

It may be right alſo to mention, that the diſtinction, before taken in regard to *loans*,‡ between an obligation to reſtore the *ſpecific* things, and a power or neceſſity of returning *others equal in value*, holds good likewiſe in the contracts of *hiring and depoſiting*: in the firſt caſe, it is a regular *bailment*; in

* Burr. 1498, &c. † 3. Bl. Comm. 8. ‡ P. 74, 75.

Celebrated law of Alfenus

the second, it becomes a *debt*. Thus, according to Alfenus in his famous law, on which the judicious Bynkershoek has learnedly commented, "if an ingot of silver be de-"livered to a silversmith to make an urn, "the *whole* property is transferred, and the "employer is only a *creditor* of metal equal-"ly valuable, which the workman engages "to *pay* in a certain shape:"* the smith may consequently apply it to his own use; but if it perish, even by unavoidable mischance or irresistible violence, he, as owner of it, must abide the loss, and the creditor must have his urn in due time. It would be otherwise, no doubt, if the *same* silver on account of its peculiar fineness, or any uncommon metal, according to the whim of the owner, were agred to be *specifically* redelivered in the form of a cup or a standish.

Hiring of CARRIAGE.

3. *Locatio operis* MERCIUM VEHENDARUM is a contract which admits of many varieties in *form*, but of none, as it seems *at length* to be settled, in the *substantial* obligations of the bailee.

A *carrier for hire* ought, by the rule, to be responsible only for *ordinary* neglect; and in the time of Henry VIII. it appears

*D. 19. 2. 31. Bynk. *Obs. Jur. Rom.* lib. VIII.

to have been generally holden, "that a *com-* "*mon* carrier was chargeable, in caſe of a "loſs by *robbery*, only when he had travel- "led by *ways dangerous for robbing*, or driv- "en by *night*, or at any *inconvenient hour*:"* but in the commercial reign of Elizabeth, it was reſolved, upon the ſame broad principles of policy and convenience that have been mentioned in the caſe of *innholders*, that, "if a *common carrier* be *robbed* of the "goods delivered to him, he ſhall anſwer for the value of them."†

Now the *reward* or *hire*, which is conſidered by Sir Edward Coke as the reaſon of this deciſion, and on which the principal ſtreſs is often laid in our own times, makes the carrier liable, indeed, for the omiſſion of *ordinary* care, but cannot extend to *irreſiſtible force*; and though ſome other bailees have a *recompence*, as *factors* and *workmen for pay*, yet even in Woodliefe's caſe, the Chief Juſtice admitted, that *robbery* was a good plea for a *factor*, though it was a bad one for a *carrier*: the true ground of that reſolution is the *public employment* exerciſed by the carrier, and the danger of his combining with *robbers* to the infinite injury of commerce and extreme inconvenience of ſociety.‡

* Doct. and Stud. where often before cited.
†1 Inſt. 89. a. Mo. 462. 1 Ro. Abr. 2. Woodliefe and Curties.
‡ Ld. Raym. 917. 12 Mod. 487.

Exceptions from the general rule.

The modern rule concerning a *common* carrier is, that "nothing will excuse him, except *the act of God*, (37) or of *the Kings enemies*;"* but a momentary attention to the principles must convince us, that this exception is in truth part of the rule itself, and that the responsibility for a loss by *robbers* is only an exception to it; a carrier is *regularly* answerable for neglect, but not, *regularly* for damage occasioned by the attacks of *ruffians*, any more than for *hostile* violence or unavoidable *misfortune*; but the

* Law of *Nisi Prius* 70, 71.

(37) See the case of "Forward v. Pittard," 1 Term Rep. 27, where the excuse founded on the "Act of God" is very fully considered, and where the defendant, a common carrier, was held answerable "*in the nature of an insurer*," for goods which were *accidentally* consumed by fire. A similar decision was given in the case of "*Hyde* v. *the Trent and Mersey* "*Navigation Company*," 5 Term Rep. 389. These two cases differed in circumstances, but were both governed by the contract of undertaking to *deliver*, it appearing in evidence, that the goods had not reached the place of their *final* destination. Where, however, goods not having arrived at the place of final delivery, are out of the custody of the carrier *as such*, this construction does not apply; and it was accordingly determined in the case of "*Garside* v. *the Proprietors of the Trent and* "*Mersey Navigation*," 4 Term R. 389. that a common carrier *between* A. and B. employed to carry goods *from A to B.* to be forwarded to a third place *(by another carrier, according to the custom,)* and putting them *gratuitously* in his warehouse at B. where they were *accidentally* destroyed by fire, *before he had an opportunity of forwarding them*, was not responsible for the loss.

great maxims of policy (38) and good government make it neceſſary to *except* from this rule the caſe of *robbery*, leſt confederacies ſhould be formed between carriers and deſperate villans with little or no chance of detection.

Although the *act of God*, which the ancients too called THEOU BIAN, and *vim divinam*, be an expreſſion, which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper as well as more decent, to ſubſtitute in its place *inevitable accident*: religion and reaſon, which can never be at variance without certain injury to one of them, aſſure us, that "not a guſt of wind blows, nor a flaſh "of lightning gleams, without the knowl- "edge and guidance of a ſuperintending "mind;" but this doctrine loſes its dignity and ſublimity by a technical application of it, which may, in ſome inſtances, border even upon profaneneſs; and law, which is

(38) Upon ſimilar grounds of policy it is ſettled, that nothing can excuſe a gaoler from responſibility in an action of debt for the eſcape of a priſoner in execution, but "*the act of* "*God, or of the Kings enemies.*" See the caſe of "*Aſcept* v. *Lyles*," 2 H. Black Rep. 108; and "*Elliot* v. *the Duke of Nor-* "*folk*," 4 Term Rep. 789. See alſo the argument of Lord Chief Juſtice Wilmot in *Drinkwater* v. *the Corporation of the* "*London Aſſurance*," 2 Wilſon, 363: and Lord Manſfield's addreſs to the jury in the caſe of "*Langdale* v. *Maſon and oth-* "*ers* at Guildhall, Trin. Vac. 1780; *Park on Inſurance*, 3d edition, p. 446.

merely a practcal ſcience, cannot uſe terms too popular and perſpicuous. (39)

In a recent caſe of an action againſt a carrier, it was holden to be no excuſe, "that "the ſhip was tight when the goods were "placed on board, but that a rat, by gnawing out the oakum, had made a ſmall hole, "through which the water had guſhed;"* but the true reaſon of this deciſion is not mentioned by the reporter: it was, in fact, *at leaſt ordinary* negligence, to let a rat do ſuch miſchief in the veſſel; and the Roman law has, on this principle, decided, that "ſi "fullo veſtimenta poliendo acceperit, eaque "*mures roſerint*, ex locato tenetur quia "*debuit ab hac re cavere*."†

* 1 Wils. part 1. 281. *Dale* and *Hall*.

† D. 19. 2. 13. 6.

(39) Long use seems to have rendered the legal sense and meaning of the words "act of God" sufficiently perspicuous, and would perhaps, make the substitution of others attended with inconvenience. It must be admitted, generally, that the 'technical application' of solemn expressions is highly indecorous; but if, beside *theology*, there be any science, in treating of which such expressions are allowable, it is *law*. The daily affairs of life evince how intimately and necessarily the sanctions of religion are practically blended with human jurisprudence; the rational connexion between them is devoutly intimated by Justinian (Prœm. ad Instit.) and sublimely personified in a much admired passage of an English classic—"Of Law no less can be acknowledged than that her "seat is the bosom of God, and her voice the harmony of the "world: all things in heaven and on earth do her homage, "the very least as feeling her care, and, the greatest, as not "exempted from her power." (Hooker, Ecc. Pol.)

Whatever doubt there may be among civilians and common-lawyers in regard to *a casket, the contents of which are concealed from the* DEPOSITARY,* it ſeems to be generally underſtood, that *a common carrier is* anſwerable for the loſs of a box or parcel, be he ever ſo *ignorant of its contents*, or be thoſe contents ever ſo valuable, *unleſs* he make a *ſpecial* acceptance :† but *groſs fraud and impoſition* by the bailor will deprive him of his action, and if there be proof that the parties were appriſed of each other's intentions, although there was no perſonal communication, the bailee may be conſidered as a *ſpecial* acceptor : this was adjudged in a very modern case particularly circumſtanced, in which the former cases in *Ventris*, *Alleyne*, and *Carthew*, are examined with liberality and wiſdom ; but, in all of them, too great ſtreſs is laid on the *reward*, and too little on the important motives of *public utility*, which alone diſtinguiſh a *carrier* from other *bailees for hire*.‡

* Before, p. 42, 43, 44 † 1 Stra. 145. *Titchburn* and *White*.

‡ Burr. 2298. *Gibbon* and *Paynton*. See 1 Vent. 238. All. 93. Carth. 485. (40)

(40) See the case of *Clay* v. *Willan and others*, 1 H Black. Rep. 298. An action in the usual form against *common carriers* was brought against the defendants, who were proprietors of a stage coach : they had published printed proposals, mentioning 'that cash, writings, &c. and similar valuable articles, *exceeding the sum of 5l. would not be accounted for if loſt, unleſs*

Law concerning masters of vessels.

Though no substantial difference is assignable between carriage by *land* and carriage by *water*, or, in other words, between a *waggon* and a *barge*, yet it soon became necessary for the courts to declare, as they did in the reign of JAMES I. that a *common hoyman* like a common *waggoner*, is responsible for goods committed to his custody, even if he be *robbed* of them ;* but the reason said to have been given for this judgment, namely, because *he had his hire*, is not the true one ; since, as we have before suggested, the

* Hob. ca. 30. 2 Cro. 330. *Rich* and *Kneeland*. "The "*first* case of the kind," said Lord *Holt*, "to be found in "our books." 12 Mod. 480.

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entered as such, and a penny insurance paid for each pound value," when delivered to the book-keeper or any other person in trust, to be conveyed by any carriage belonging to their inn. The person who brought the plaintiff's parcel to be booked knew of the above terms, and that the parcel was above 5*l* value, but did not discover the contents, and paid only the ordinary price of carriage, which amounted to 2*s*. with an additional demand of 2*d*. for booking. There were counts in the declaration for money had and received, lent and advanced, &c. and the plaintiff finding that by the *express* terms of the printed proposal, he could not recover even to the amount of 5*l*. claimed a verdict for 2*s* 2*d*. in order to secure his costs, no money having been paid into court by the defendants, or tendered before the action was commenced ; but the court decided that the plaintiff was not entitled either to the 5*l*. or the money advanced for the carriage or booking. In the above case no proof appears to have been adduced of *negligence*, or *conversion* of the parcel by the defendants or their servants; and it would have been inconsistent with legal principles to have *presumed* that the defendants acted contrary to the trust reposed in them.

recompence could only make him liable for *temerity* and *imprudence*; as if a bargemaster were raſhly to ſhoot a bridge, *when the bent of the weather is tempeſtuous*; but not for a *mere caſualty*, as if a hoy in good condition, ſhooting a bridge *at a proper time*, were driven againſt a pier by a ſudden breeze, and overſet by the violence of the ſhock;* nor, by parity of reaſon, for any other force too great to be reſiſted:† the *public* employment of the *boyman*, and that *diſtruſt* which an ancient writer juſtly calls the *ſinew of wiſdom*, are the real grounds of the law's rigour in making ſuch a perſon reſponſible for a loſs by *robbery*.

All that has juſt been advanced concerning a *land* carrier may, therefore, be applied to a *bargemaſter* or *boatman*: but, in caſe of a tempeſt, it may ſometimes happen that the law of *jetſon* and *average* may occaſion a difference. Barcroft's caſe, as is it cited by Chief Juſtice Rolle, has ſome appearance of hardſhip: "a box of *jewels* had been de-"livered to a ferryman, *who knew not what* "*it contained*, and a ſudden ſtorm ariſing in "the paſſage, he threw the box into the "ſea; yet it was reſolved *that he ſhould*

* 1 Stra. 128 *Amies* and *Stevens*.

† Palm. 548. W. Jo. 159. See the doctrine of *inevitable accident* moſt learnedly diſcuſſed in *Desid. Heraldi* Animady. in *Salmaſii* Obſerv. in Jus *Att.* et *Rom.* cap. xv.

*anſwer for it:"** now I cannot help ſuſpecting, that there was proof in this caſe of *culpable negligence*, and probably the caſket was both *ſmall* and *light* enough to have been kept longer on board than other goods; for in the caſe of *Graveſend* barge, cited on the bench by Lord Coke, it appears, that the pack which was thrown overboard in a tempeſt, and for which the bargemen was holden *not anſwerable*, was of great value *and great weight;* although this laſt circumſtance be omitted by Rolle, who ſays only, that the maſter of the veſſel had *no information of its contents.*†

The ſubtility of the human mind, in finding diſtinctions, has no bounds; and it was imagined by ſome, that, whatever might be the obligation of a *barge*-maſter, there was no reaſon to be equally rigorous in regard to the maſter of a *ſhip;* who, if he carry goods for *profit*, muſt indubitably anſwer for the *ordinary neglect* of himſelf or his mariners, but ought not, they ſaid, to be chargeable for the violence of *robbers:* it was, however, otherwiſe decided in the great caſe of *Mors* and *Slew*, where, "eleven "perſons armed came on board the ſhip "*in the river*, under pretence of *impreſſing* "*ſeamen*, and forcibly took the [illegible] "which the defendant had engaged to

* All. 93. † 2 Bulstr. 280. 2. Ro. Abr. 567.

" ry ;" and though the maſter was entirely blameleſs, yet Sir Matthew Hale and his brethren, having heard both civilians and common lawyers, and, among them, Mr. Holt for the plaintiff, determined, on the principles juſt before eſtabliſhed, that the bailor ought to recover.* This caſe was frequently mentioned afterwards by Lord Holt, who ſaid, that " the declaration was " drawn by the greateſt pleader in *England* " of his time."†

Still farther: ſince neither the *element*, on which the goods are carried, nor the *magnitude* and *form* of the carriage, make any difference in the reſponſibility of the bailee, one would hardly have conceived, that a diverſity could have been taken between a *letter* and any other thing. Our *common* law, indeed, was acquainted with no ſuch diverſity; and a *private* poſt-maſter was preciſely in the ſituation of another carrier; but the ſtatute of Charles II. having eſtabliſhed a *general* poſt-office, and taken away the liberty of ſending letters by a *pri-*

* 1 Ventr. 190. 238. Raym. 220. (41)

† *Ld.* Raym. 920.

(41) By Stat. 7 Geo. II chap 15. § 1, it is enacted, that ſhip-owners ſhall not be liable for any loſs ariſing from the miſconduct of the maſter or mariners, beyond *the value of the ſhip and freight*; ſee the caſe of *'Sutton v. Mitchell,'* 1 Term Rep. 18.

vate poſt,* it was thought, that an alteration was made in the obligation of the poſt-maſter-*general;* and in the caſe of Lane and Cotton, three judges determined, againſt the fixed and well-ſupported opinion of Chief juſtice Holt, "that the poſt-maſter "was *not* anſwerable for the loſs of a letter "with exchequer bills in it:"† now this was a caſe of *ordinary* neglect, for the bills were *ſtolen* out of the plaintiff's letter *in the defendant's office;*‡ and as the maſter has

Case of Lane and Cotton.

* 12. Cha. II. ch 35. See the subsequent statutes.

† Carth. 487. 12 Mod 482. (42)

‡ In addition to the authorities before cited, see note p. 50, for the distinction between a loss by *stealth* and by *robbery*, see *Dumoulin*, tract *De eo quod interest*, n 184. and ROSELLA-GASUUM, 28. b This last is the book which *St. German* improperly calls *Summa Rosella*, and by misquoting which he misled me in the passage concerning *the fall of a house*, p. 68. The words of the author, *Trovamala*, are these: "Domus "tua *minabatur ruinam*; domus corruit, et interficit equum "tibi *commodatum*; certe non potest dici casus fortuitus; "quia *diligentissimus* reparasset domum, vel ibi non habitas-"set; si autem domus *non* minabatur ruinam, sed *impetu tem-*"*pestatis* validæ corruit, non est tibi imputandum."

(42) 1 Ld. Raym 646 S. C. See also Whitfield v. Lord le Despencer, Cowper, 754 where the decision in Lane v. Cotton is confirmed: and where it is settled, that no action of the kind can be supported except in the circumstance of *personal* misconduct in any party employed by the Post-Office. Lord Holt's and our author's reasoning on the subject certainly possesses the advantage of *analogy*, but in the last case Lord Mansfield (764) places the post establishment in a new light; and the two concurring determinations now give the *law* on this point, producing that 'certainty,' which, as Lord Coke observes, 'is the mother of quiet and repose.'

a great *ſalary* for the diſcharge of his truſt; as he ought clearly to anſwer for the acts of his clerks and agents; as the ſtatute, profeſſedly enacted for *ſafety* as well as *diſpatch* could not have been intended to deprive the ſubject of any benefit which he before enjoyed; for theſe reaſons, and for many others, I believe that Cicero would have ſaid what he wrote on a ſimilar occaſion to Trebatius, "Ego tamen SCÆVOLÆ aſſentior."* It would, perhaps, have been different *under the ſtatute*, if the poſt had been *robbed* either by day or by *night*, when there is a neceſſity of travelling, but even that queſtion would have been indisputable; and here I may conclude this diviſion of my Eſſay with obſerving, in the plain but emphatical language of St. GERMAN, "that "all the *former* diverſities be granted by "ſecondary concluſions derived upon the "law of reaſon, *without any ſtatute made in* "*that behalf:* and, peradventure, laws and "the concluſions therein be the more plain "and the more open; for *if any ſtatute* "*were made therein*, I think verily, more "doubts and queſtions would ariſe *upon the* "*ſtatute*, than doth now, when they be only "argued and judged after the *common-law*."†

* Epiſt. ad Fam. VII. 22.

† Doct. *and* Stud *dial.* 2 *chap.* 38. laſt ſentence.

by Stiernhook, fully proves his aſſertion, that "a depoſitary was reſponſible for *irreſiſtible force;*" but I obſerve, that the military lawgivers of the North, who entertained very high notions of good faith and honor, were more ſtrict than the Romans in the duties by which depoſitaries and other truſtees were bound: an exact conformity could hardly be expected between the ordinances of poliſhed ſtates, and thoſe of a people who could ſuffer diſputes concerning bailments to be decided by *combat;* for it was the Emperor Frederick II. who aboliſhed the trial by battle in caſes of conteſted depoſits, and ſubſtituted a more rational mode of proof.*

Laws of the Indians.

I purpoſely reſerved to the laſt the mention of the HINDU, or Indian, code, which the learning and induſtry of my much-eſteemed friend Mr. Halhed has made acceſſible to Europeans, (43) and the PER-

* LL. *Longobard.* lib. 2. tit. 55. § 35. Conſtit. Neapol lib. 2. tit. 34.

(43) By an English translation published in 1781, the preface to the work contains many valuable remarks on the history and antiquities of India: with respect to the code, Sir William Jones truly obſerves that "the rules of the Pundits concerning *ſucceſſion* to *property*, the *puniſhment* of *offences*, and the *ceremonies of religion*, are widely different from ours;" it may, however, be remarked, that the chapter "of the diviſion of inheritance of property," and that "of juſtice," are by no means unworthy the attention of the British lawyer, who is diſpoſed to extend the reſearches connected with

SIAN tranſlation of which I have had the pleaſure of ſeeing: theſe laws, which muſt *in all times* be a ſingular object of curioſity, are *now* of infinite importance: ſince the happineſs of millions, whom a ſeries of amazing events has ſubjected to a Britiſh power, depends on a ſtrict obſervance of them.

It is pleaſing to remark the ſimilarity, or rather identity, of thoſe concluſions, which pure unbiaſſed reaſon in all ages and nations ſeldom fails to draw, in ſuch juridical inquiries as are not fettered and manacled by *poſitive* inſtitution: and although the rules of the Pundits concerning *ſucceſſion* to *property*, the *puniſhment* of *offences*, and the *ceremonies* of *religion*, are widely different from ours, yet in the great ſyſtem of *con-*

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his profeſſional ſcience. From the following paſſage in the chapter "of juſtice," a *tyro* at the bar may derive ſome profitable inſtruction in the important and difficult art of cross-examination. "When two perſons, upon a quarrel, refer to "arbitrators, thoſe arbitrators, at the time of examination, "ſhall obſerve both the plaintiff and defendant narrowly, "and take notice if either, and which of them, when he is "ſpeaking, hath his voice faulter in his throat, or his colour "change, or his forehead ſweat, or the hair of his body ſtand "erect, or a trembling come over his limbs, or his eyes wa-"ter; or if during the trial, he cannot ſtand ſtill in his place, "or frequently licks and moiſtens his tongue, or hath his "face grow dry, or in ſpeaking to one point, wavers and "ſhuffles off to another, or if any perſon puts a queſtion to "him, is unable to return an anſwer;—from the circumſtan-"ces of ſuch commotions they ſhall diſtinguiſh the guilty "party." Halhed's Code of Gentoo Laws, c. 3. p. 105.

tracts and the common intercourse between man and man, the Pootee of the Indians (44) and the Digest of the Romans are by no means dissimilar.*

Thus it is ordained by the sages of Hindustan, that "a depositor shall carefully inquire into the character of his intended "depositary; who, if he undertake to keep "the goods, shall preserve them with care "and *attention*; but shall not be bound to "restore the value of them if they be *spoiled by unforeseen accident*, or *burned*, or *stolen*; UNLESS he *conceal* any part of them "that has been saved, or unless *his own effects be secured*, or unless the accident "happen after his *refusal* to redeliver the "goods on a demand made by the depositor, or, while the depositary, against the "nature of the trust, presumes to *make use* "of them;" in other words, "the bailee "is made answerable for *fraud*, or for *such* "*negligence* (45) as approaches to it."†

* "Hæc omnia," says Grotius, "*Romanis* quidem consuetudo legibus, sed non ex illis primitus, sed ex *æquitate* naturali, venisse: quare eadem apud alias quoque gentes reperire est." De Jure Belli ac Pacis, lib. 2. cap. 12. § 15.

† Gentoo Laws, chap. 4. See before p. 54.

(44) Dr. Robertson (see his Disquisition on India, Appendix, p. 247—254.) bestows his approbation on the Indian Code, and compares it with that of Justinian.

(45) The words of this part of the Brahminical institutions are solemn and remarkable: they prove that the oriental na-

6. LETTING TO HIRE is, 1. a *bailment of* A THING *to be used* by the hirer *for a compensation in money;* or, 2. a *letting out of* WORK and LABOR to be *done*, or CARE and ATTENTION to be *bestowed*, by the bailee, *on the goods bailed*, and that for *a pecuniary recompence;* or 3. of CARE and PAINS in *carrying the things delivered from one place to another for a stipulated or implied reward.*

7. INNOMINATE BAILMENTS are those where the *compensation* for the *use* of a thing, or for *labor* and *attention*, is *not pecuniary;* but either, 1. the *reciprocal use* or the *gift* of some *other* thing; or, 2. *work* and *pains*, *reciprocally* undertaken; or 3. the *use* or *gift* of another thing in consideration of *care* and *labor*, and conversely.

8 ORDINARY *neglect* is the *omission* of that *care* which *every man of common prudence, and capable of governing a family*, takes of *his own* concerns.

9. GROSS *neglect* is the *want* of that *care* which *every man of common sense, how inattentive soever*, takes of *his own* property.

10. SLIGHT *neglect* is the *omission* of that *diligence* which *very circumspect and thoughtful persons* use in securing *their own* goods and chattels.

11. A NAKED CONTRACT is a contract made without *consideration* or *recompence.*

but finding that, as Bynkerſheck expreſſes himſelf with an honeſt pride, *I had leiſure ſometimes to write, but never to copy*, and thinking it unjuſt to embelliſh any production of mine with the inventions of another, I changed my plan: and ſhall barely recapitulate the doctrine expounded in the preceding pages, obſerving the method which logicians call *Syntheſis*, and in which all ſciences ought to be explained. III. The Synthesis

I. To begin then with the *definitions*: 1. BAILMENT *is a delivery of goods in truſt, on a contract expreſſed or implied, that the truſt ſhall be duly executed, and the goods re-delivered, as ſoon as the time for which they were bailed ſhall have elapſed or be performed.* Definitions.

2. DEPOSIT *is a bailment* of goods *to be kept for the bailor without recompence.*

3. MANDATE is a *bailment* of goods, *without reward*, to be *carried from place to place*, or *to have ſome act performed about them.*

4. LENDING FOR USE is a *bailment* of *a thing* for a certain time *to be uſed* by the borrower *without paying for it.*

5. PLEDGING is a *bailment* of goods by a debtor to his creditor *to be kept till the debt be diſcharged.*

ed or ſpoiled by *natural* misfortune or the injuſtice of the *ruling power*, UNLESS it be kept *after the time* limited for the return of the goods, or the performance of the work.*

All theſe proviſions are conſonant to the principles eſtabliſhed in this Eſſay; and I cannot help thinking, that a clear and conciſe treatiſe, written in the Perſian or Arabian language, on the law of Contracts, and evincing the general conformity between the Aſiatic and European ſyſtems, would contribute, as much as any regulation whatever, to bring our Engliſh law into good odour among thoſe whoſe fate it is to be under our dominion, and whoſe happineſs ought to be a ſerious and continual object of our care.

Thus have I proved, agreeably to my underſtanding, that *the plain elements of natural law*, on the ſubject of BAILMENTS, *which have been traced by a ſhort analyſis*, are recogniſed and confirmed by the wiſdom of nations:† and I haſten to the third, or *ſynthetical*, part of my work, in which from the nature of it, moſt of the *definitions* and *rules* already given muſt be repeated with little variation in *form*, and none in *ſubſtance*: it was at firſt my deſign to ſubjoin, with a few alterations, the Synopsis of DELRIO;

* Chap. 4. and chap. 10, before p. 89, 93.

† Before p. 5 and 12.

but finding that, as Bynkerſheck expreſſes himſelf with an honeſt pride, *I had leiſure ſometimes to write, but never to copy*, and thinking it unjuſt to embelliſh any production of mine with the inventions of another, I changed my plan: and ſhall barely recapitulate the doctrine expounded in the preceding pages, obſerving the method which logicians call *Syntheſis*, and in which all ſciences ought to be explained. III. The Synthesis

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* Chap. 4. and chap. 10. before p. 89, 93.

† Before p. 5 and 12.

So a *borrower* is declared to be chargeable even for *casualty* or *violence*, if he fail to return the thing after the completion of the business for which he borrowed it; but not, if it be *accidentally* lost or *forcibly* seized, *before* the expiration of the time, or the conclusion of the affair, for which it was lent:* in another place it is provided, that, if a *pledge* be damaged or lost by *unforeseen accident*, the creditor shall nevertheless recover his debt with interest, but the debtor shall not be entitled to the value of his pawn;† and that, if the pledgee *use* the thing pledged, he shall pay the value of it to the pledgor in case of its loss or damage, whilst he uses it.‡

In the same manner, if a person *hire* a thing *for use*, or if any *metal* be delivered to a *workman*, for the purpose of making vessels or ornaments, the bailees are holden to be discharged, if the thing bailed be destroy-

* Same chapter. See before, p. 79.

† Chap. 1. § 1. Before, p. 85.

‡ Chap. 1. § 2. Before p. 93.

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tions on the subject of hospitality to *persons*, are extended with scrupulous consistency to the deposit of *goods*. "If a "person should make use of any property entrusted to him, or "it be spoiled for want of his care and attention, then what- "ever crime it is for a woman to abuse her husband, or for a "man to murder his friend, the same degree of guilt shall be "imputed to him, and the value of the trust must be made "good." Gentoo Laws, c. 4. p. 120.

II. The *rules*, which may be considered as *axioms* flowing from natural reason, good morals, and sound policy, are these: Rules.

1. A bailee, who derives *no benefit* from his undertaking, is responsible only for GROSS neglect.

2. A bailee, who *alone* receives *benefit* from the bailment, is responsible for SLIGHT neglect.

3. When the bailment is *beneficial* to *both* parties, the bailee must answer for ORDINARY neglect.

4. A SPECIAL AGREEMENT of any bailee to answer for *more* or *less*, is in general valid.

5. ALL bailees are answerable for actual FRAUD, even *though the contrary be stipulated.*

6. No bailee shall be charged for a loss by *inevitable* ACCIDENT or *irresistible* FORCE, except by *special agreement.*

7. ROBBERY by *force* is considered as *irresistible;* but a loss by *private* STEALTH is *presumptive* evidence of *ordinary* neglect.

8. GROSS neglect is *a violation of good faith.*

9. No ACTION lies to compel performance of a *naked contract.*

10. A reparation may be obtained by

ſuit for every DAMAGE occaſioned by an INJURY.

11. The negligence of a SERVANT, acting *by his maſter's expreſs or implied order*, is the negligence of the MASTER.

III. From theſe *rules* the following *propoſitions* are evidently deducible:

Propoſitions.

1. A DEPOSITARY is reſponſible only for GROSS neglect; or in other words, for a *violation of good faith.*

2. A DEPOSITARY, whoſe character is known to his depoſitor, ſhall not anſwer for *mere neglect*, if he take *no better care of his own* goods, and *they alſo* be ſpoiled or deſtroyed.

3. A MANDATARY *to carry* is reſponſible only for GROSS neglect, or *a breach of good faith.*

4. A MANDATARY *to perform a work* is bound to uſe *a degree of diligence adequate to the performance of it.*

5. A man cannot be compelled by ACTION to perform his promiſe of engaging in a DEPOSIT or a MANDATE.

6. A reparation may be obtained by ſuit for DAMAGE occaſioned by the *non-performance* of a promiſe to become a DEPOSITARY or a MANDATARY.

7. A BORROWER FOR USE is reſponſible for SLIGHT negligence.

8. A PAWNEE is anſwerable for ORDINARY neglect.

9. The HIRER of a THING is anſwerable for ORDINARY neglect.

10. A WORKMAN for HIRE muſt anſwer for ORDINARY neglect of the goods bailed, and apply a *degree of* SKILL *equal to his undertaking*.

11. A LELTER TO HIRE of his CARE and ATTENTION is reſponſible for *ORDINARY* negligence.

12. A *CARRIER*, for *HIRE*, *by land*, or by *water*, is anſwerable for *ORDINARY* neglect.

IV. To theſe *rules* and *propoſitions* there are ſome *exceptions*. Exceptions.

1. A man who *ſpontaneouſly* and *officiouſly* engages to *keep*, or to *carry*, the goods of another, though *without reward*, muſt anſwer for SLIGHT neglect

2. If a man, through *ſtrong perſuaſion* and with *reluctance*, undertake the execution of a MANDATE, no more can be required of him than *a fair exertion of his ability*.

3. ALL bailees become reſponſible for loſſes by CASUALTY or VIOLENCE, *after* their *refuſal* to return things bailed on a LAWFUL DEMAND.

4. A *BORROWER* and a *HIRER* are anſwerable in ALL EVENTS, if they *keep* the things borrowed or hired *after the ſtipulated*

time, or *uſe* them *differently* from their agreement.

5. A DEPOSITARY and a PAWNEE are anſwerable in ALL EVENTS, if they *uſe* the things depoſited or pawned.

6. AN INN-KEEPER is chargeable for the goods of his gueſt *within his inn*, if the gueſt be *robbed* by the *ſervants* or *inmates* of the keeper.

7. A COMMON CARRIER, by *land* or by *water*, muſt indemnify the owner of the goods carried, if he be ROBBED of them.

General corollary and remark.

V. It is *no* exception, but a *corollary*, from the *rules*, that "every bailee is reſponſible for "a loſs by ACCIDENT or FORCE, "however *inevitable* or *irreſiſtible*, if it be "*occaſioned* by that *degree of negligence*, for "which the nature of his contract makes "him generally anſwerable:" and I may here conclude my diſcuſſion of this important title in juriſprudence with a general and obvious *remark*; that "*all* the preced-"ing rules and propoſitions may be diver-"ſified to *infinity* by the *circumſtances* of ev-"ery particular caſe;" on which circumſtances it is on the Continent the province of a *judge* appointed by the ſovereign, and in ENGLAND, to our conſtant honor and happineſs, of a *jury* freely choſen by the parties, *finally* to decide: thus, when a

painted *cartoon*, paſted on canvaſs, had been *depoſited*, and the bailee kept it ſo near a damp wall, that it peeled and was much injured, the queſtion, "whether the depoſitary had been guilty of GROSS neglect," was properly left to the jury, and, on a verdict for the plaintiff with pretty large damages, the court refuſed to grant a new trial;* but it was the judge who determined, that the defendant was by *law* reſponſible for *groſs* negligence *only*; and if it had been proved, that the bailee had kept *his own* pictures *of the ſame ſort* in the ſame place and manner, and that *they too* had been ſpoiled, a new trial would, I conceive have been granted; and ſo, if no more than SLIGHT neglect had been committed, and the jury had, nevertheleſs, taken upon themſelves to decide againſt law, that a bailee *without reward* was reſponſible for it.

Conclusion.

Should the *method* uſed in this little tract be approved, I may poſſibly not want inclination, if I do not want leiſure, to diſcuſs in the ſame form *every* branch of *Engliſh* law, *civil* and *criminal*, *private* and *public*; after which it will be eaſy to ſeparate and mould into diſtinct works, the three principal diviſions; or the *analytical*, the *hiſtorical*, and the *ſynthetical*, parts.

* 2 Stra. 1099, *Mytton* and *Cock*.

The great ſyſtem of juriſprudence, like that of the Univerſe, conſiſts of many ſubordinate ſyſtems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully perſuaded myſelf, is reducible to a few plain *elements*, either the wiſe *maxims* of national policy and general convenience, or the *poſitive* rules of our forefathers, which are ſeldom deficient in wiſdom or utility: if LAW *be* a *ſcience*, and really deſerve ſo ſublime a name, it muſt be founded on principle, and claim an exalted rank in the empire of *reaſon*; but if it be *merely* an unconnected ſeries of decrees and ordinances, its uſe may remain, though its dignity be leſſened, and he will become the greateſt lawyer who has the ſtrongeſt habitual or artificial *memory*. In practice, law certainly employs *two* of the mental faculties; *reaſon*, in the primary inveſtigation and deciſion of points *entirely new*; and *memory*, in tranſmitting to us the reaſon of ſage and learned men, to which our own ought invariably to yield, if not from a becoming modeſty, at leaſt from a juſt attention to that object, for which all laws are framed and all ſocieties inſtituted, THE GOOD OF MANKIND.

APPENDIX.

Trinity Term 2 Annæ reginæ.

Coggs *v.* Bernard.*

S. C. Com. 133. Salk. 26. 3 Salk. 11. Holt. 13. Entry. Salk. 785. 8 Ld. Raym. 165.

If a man undertakes to carry goods † safely and securely he is responsible for any damage they may sustain in the carriage thro' his neglect tho' he was not a common carrier and was to have nothing for the carriage. Vide 1 H. Bl 158.

In an action upon the case the plaintiff declared, *quod cum Bernard* the defendant, the tenth of *November*, 13 *Will.* 3. at &c. *assumpsisset, salvo et secure elevere (Anglice*, to take up) several hogsheads of Brandy then in a certain cellar in *D. et salvo et secure deponere (Anglice*, to lay them down again) in a certain other cellar in *Water-lane*, the said defendant and his servants and agents *tam negligenter et improvide* put them down again into the said other cellar, *quod per defectum curae ipsius* the defendant, his servants and agents, one of the casks was stav'd, and a great quantity of brandy, *viz.* so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains. And the case being thought to be a case of great consequence, it was this day argued *seriatim* by the whole court.

* 2 *Ld. Raym.* 909. † Vide ante, 70.

Gould Justice. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man, that undertakes to carry goods, is liable to an action, be he a common carrier or whatever he is, if through his neglect they are lost, or come to any damage: and if a *Praemium* be laid to be given, then it is without question so..... The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without any thing to be had for his pains, an* action will not lie for non-performance, because it is *nudum pactum*. So is the 3 *H.* 6. 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 26. *Ass.* 28. But there will be a difference in that case upon the evidence, how the matter appears; if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action; otherwise, if there be no gross neglect. So is *Doct. and Stud.* 129. upon that difference. The same difference is where he comes to goods by finding. *Doct. and Stud. ubi supra. Cro.* 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is *Keilw.* 160. 2 *H.* 7. 11. 22. *Ass.* 41. 1 *R.* 10. *Bro. action sur le case*, 78. *Southcote's* case is a hard case indeed, to oblige all men, that take goods to keep to a special acceptance, that they will keep them as safe as they would do their own, which is a thing no man living that is not a lay-

* Vide 2 *Ld. Raym.* 919.

yer could think of: and indeed it appears by the report of that case in *Cro. El.* 815. that it was adjudged by two judges only, *viz. Gawdy* and *Clench*. But in 1 *Ventr.* 121. there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for 30*l.* the defendant shewed that he locked the money up in his master's warehouse, and it was stole from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms. 2 *Ld. Raym.* 910.

Powys agreed upon the neglect.

Powell. The doubt is, because it is not mentioned in the declaration, that the defendant had any thing for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend; when there is not any particular neglect shewn? And I hold, an action will lie, as this case is. And in order to make it out I shall first shew, that there are great authorities for me, and none against me; and then secondly, I shall shew the reason and *gist* of this action; and then thirdly, I shall consider *Southcote's* case.

1. Those authorities in the *Register* 110. *a. b.* of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them, but that they are writs, which are framed short. But a writ upon the case must mention every thing that is material in the case, and nothing is to be added to it in the count, but the time, and such other circumstances. But even that objection is answered by *Rast. Entr.* 13. *c.* where there is a declaration so gen-

eral. The year books are full in this point. 43 *Ed.* 3. 33. *a.* there is no particular act shewed. There indeed the weight is laid more upon the neglect than the contract. But in 48 *Ed.* 3. 6 and 19 *H.* 6. 49. there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be a matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 *H.* 7. 11. 7 *H.* 4. 14. these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now to give the reason of these cases, the *gist* of these actions is the undertaking. The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, *&c.* So it is 1 *Jones* 179. *Palm.* 548. For the bailee is not bound, upon any undertaking against the act of God. Justice *Jones* in that case puts the case of the 22 *Ass.* where the ferryman overladed the boat. That is no authority I confess in that case, for the action there is founded upon the ferryman's act, *viz.* the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat..... But bailees are chargeable in case of other accidents, because they have a remedy against wrong doers: as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case 2 *Ld. Raym.* 911.

he shall not be answerable. But it is objected that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An* action indeed will not lie for not doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you, upon your undertating, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the Countess of *Salop*. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration, the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the† action would have lain upon that special undertaking. But there the action was laid generally.

Warranty without a consideration is good.

8. *Southcote's*‡ case is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is

* Vide 2 *Ld. Raym.* 919, and the books there cited.

† Vide Com. 627 Burr. 1638.

‡ That notion in Southcote's case, 4 Rep. 83. b. that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole court, *ex relatione m'ri Bunbury*. Note to 3d Ed.

founded upon the undertaking. But I cannot think, that a general bailment is an undertaking to keep the goods safely at all events. That is hard. *Coke* reports the case upon that reason, but makes a difference where a man undertakes specially, to keep goods as he will keep his own. Let us consider the reason of the case. For nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 *Ed.* 4. 40. *b.* there is such an opinion by *Danby*. The case in 8 *H.* 7. 4. was of a special bailment, so that the case cannot go very far in the matter. 6 *H.* 7. 12. there is such an opinion by the bye. And this is all the foundation of *Southcote's* case. But there are cases there cited, which are stronger against it, as 10 *H.* 7. 26. 29 *Ass.* 28. the case of a pawn. My lord *Coke* would distinguish that case of a pawn from a bailment, because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep. 8 *Ed.* 2. *Fitzh. Detinue*, 59. the case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that case, sure it would be hard, that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or however it may be with them, half mankind never heard of it. So for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if* a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee

2 *Ld. Raym.* 912.

* Vide ante 50.

to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

Holt, Chief Justice. The case is shortly this.—This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at *Guildhall*. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to shew the grounds, upon which a man shall be charged with goods put into his custody, I must shew the several sorts of bailments. And* there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*, and is that sort of bailment which is mentioned in *Southcote's* case. The second sort is, when goods or chattels that are useful, are lent to a friend *gratis*, to be used by him; and this is called *commodatum*, because the thing is to be re-

2 *Ld. Raym.* 913.

Accommodatum.

* Vide ante 40.

stored in *specie*. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*.

Pawns.

The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in *Latin vadium*, and in *English* a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them.

Things to be carried, &c for a reward.

The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage, which is this present case. I mention these things not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

To be carried without reward.

A man who receives goods to keep gratis for the use of the bailor is not answerable for their loss or for any damage they may sustain unless he was guilty of some gross neglect with respect to them.

As to the* first sort, where a man takes goods into his custody to keep for the use of the bailor, I shall consider, for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is I confess a great authority against me, where it is held, that a general

* Vide ante 42.

delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But* my lord *Coke* has improved the case in his report of it, for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine, to shew an undisturbed rule and practice of the law according to this position. But to shew that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter and by them shew, that there never was any such resolution given before *Southcote's* case. The 29 *Ass.* 28. is the first case in the books upon that learning, and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 *Edw.* 2. *Fitz. Detinue* 59. where the goods were locked in a chest, and left with the bailee, and the owner took away the kee, and the

Vide Str. 1099. Nor even then if he was guilty of the same neglect with respect to his own. D. acc. 2 Ld. Raym. 655. Semb. acc. Burr. 2300. Vide ante 52. 72.

2 *Ld. Raym.* 914.

* Vide 2 Ld. Raym 655. Ante 46.

goods were stolen, and it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 *Edw.* 4. 40. *b.* was but a debate at bar. For *Danby* was but a counsel then, though he had been chief justice in the beginning of *Ed.* 4. yet he was removed and restored again upon the restitution of *Hen.* 6 as appears by *Dugdale's Chronica Series.* So that what he said connot be taken to be any authority, for he spoke only for his client; and *Genney* for his client said the contrary. The case in 3 *Hen.* 7. 4. is but a sudden opinion, and that but by half the court; and yet that is the only ground for this opinion of my lord *Coke*, which besides he has improved. But the practice has been always at *Guildhall*, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice *Pemberton's* time, and ever since, against the opinion of that case. When I read *Southcote's* case heretofore, I was not so discerning as my brother *Powys* tells us he was, to disallow that case at first, and came not to be of this opinion, till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently,

yet he is not chargeable for them; for the keeping them as he keeps his own, is an argument of his honesty. *A fortiori* he shall not be charged, where they are stolen without any neglect in him. Agreeable to this is *Bracton, lib.* 3. *c.* 2. 99. *b. J. S. apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpae autem nomine non tenetur, scilicet desidiae vel negligentiae, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriae fatuitati hoc debet imputare.* As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods, than he takes of his own. This *Bracton* I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in *Justinian's Inst. lib.* 3. *tit.* 15. There the law goes farther, for there it is said, *Ex eo solo tenetur, si quid dolo commiserit: culpae autem nomine: id est, desidiae ac negligentiae, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit non ei, sed suae facilitati id imputare debet.* So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that

2 *Ld. Raym.* 915.

A gross neglect an evidence of fraud.

won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. *Hob.* 34 a covenant that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrong-doers. 3 *Cro.* 214. *acc.* 2 *Cro.* 425. *acc.* upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong-doers when put in writing, it is hard it should do it more so when spoken. *Doct. and Stud.* 130. is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for keeping of them, he will not be answerable for the acts of a wrong doer. So that there is neither sufficient reason nor authority to support the opinion in *Southcote's* case; if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, *viz. commodatum* or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable: as if a man should lend another a horse, to go Westward, or for a month; if the bailee go Northward, or keep the horse above a month, if any accident happen to the horse in the Northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to

Though a man who takes goods to keep gratis for the use of the bailee expressly undertakes to redeliver them safely, he is not responsible for any loss or damage occasioned by a wrong doer. Sed vide ante 51.

The borrower of goods is responsible for any damage or loss, if it was occasioned by his neglect. Vide ante 75 84, 85. or if he used the goods in a manner not warranted by the terms of the loan. Vide ante 79.

the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him..... This is mentioned in *Bracton, ubi supra:* his words are, *Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursa, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatum domi, secum detulerit, cum peregre profectus fuerit et illam incursu hostium vel prædonum, vel naufragio amiserit non est dubium quin ad rei restitutionem teneatur.* I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. *Brac-*

2 Ld. Raym. 916.

Note in the Bracton before me, it is commodatam, but that must be a mistake as you will find by Justinian, ubi supra, from whence Bracton has taken all his distinctions, and that almost word for word.

The borrower of goods shall not be responsible for a loss by robbery, unless the robbery was occasioned or facilitated by some neglect on his part. Vide, ante 76.

ton says, the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

The hirer of goods is responsible wherever the borrower would be, sed vide ante 86. 87. and not elsewhere.

As to the third sort of bailment, *scilicet locatio* or lending for hire, in this case the bailee is also bound to take the utmost care and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author, *fol.* 62. *b. Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem* diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est.* From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the† bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, *viz. vadium* or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for‡ the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay

* Vide ante 88. † D. acc. 2 *Ld. Raym.* 1087.

‡ S. P. 3 Salk. 268. Holt, 528. Salk. 522.

him. But if the pawn be such as it will be the worse for using, the* pawnee cannot use it, as clothes, &c. but if it be such, as will be never the worse, as if jewels for the purpose were pawned to a lady, she† might use them. But then she must do it at her peril, for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is *Ow.* 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c. then‡ the pawnee may use the horse in a reasonable manner, or milk the cow, &c. in recompence for the meat. As to the second point *Bracton* 99. *b.* gives you the answer. *Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utrjusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere.* In effect, if a creditor takes a pawn, he is bound to restore

2 *Ld. Raym.* 917.

If a pawnee use the pawn about the keeping of which he is at no charge, he is answerable at all events for any loss or damage which may happen with respect to it while he is using it. S. P. 3 Salk. 268. Holt. 528 Salk. 522. vide ante 92, 93.

The pawnee of goods is respon-

* S. P. 3 Salk. 268 Holt 528. Salk. 522.

† S. P. 3 Salk. 268. Holt. 528. Salk 522. vide ante 92, 93

‡ S. P. 3 Salk. 268. Holt. 528. Salk. 522. vide ante 92, 93

sible for any loss or damage with respect to the pawn while he is warranted in detaining it, if it was occasioned by his negligence. Vide ante 86 otherwise he is not. S. P. 3 Salk. 268. Salk. 512. vide ante 86.

it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 *As.* 28. and *Southcote's* case. —But indeed the reason given in *Southcote's* case is, because the pawnee has a special property in the pawn. But that is not the reason of this case; and there is another reason given for it in the book of *Assize*, which is in deed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only, that he shall use an ordinary care for restoring the goods. But indeed, if the money for which the goods were pawned, be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

But he is answerable at all events for any loss or damage which happens after he ought to have returned the pawn, S. P. 3 Salk. 268. Holt. 528 Salk. 522 vide 2 *Ld Raym.* 753. Ante 91. A man that keeps goods by wrong is at all events answerable for their loss or damage. vide ante 81.

As to the fifth sort of bailment, *viz* a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a-

delivery to one that exercises a public employment, or a delivery to a private person. First if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c. which case of a master of a ship was first adjudged 26 *Car.* 2. in the case of *Mors* v. *Slew. Raym.* 220. 1 *Vent.* 190. 238. The law charges this person thus intrusted to carry goods, against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c. and yet doing it in such manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailees, factors, and such like. And though a bailee is to have a reward for his management, yet he is only to do the best he can. And if he be robbed,

2 *Ld. Raym.* 918.

If goods are delivered to a person in a public employment for a purpose in respect of which he is to have a reward, he is answerable for any loss or damage which is not occasioned by the act of God or the king's enemies. S. P. Holt. 131. R. acc. 1 Wils. 281. Barclay v. Yann B. R. E. T. 24 G. 3. Trent and Mersey Com. v. Wood. B. R. E. T. 25 G. 3. 1. T. R. 27. vide 2. *Ld Raym.* 264. Str. 128. Burr. 2500 2827. Ante 107.

A bailiff or factor, though he is to have a reward, is not answerable for any loss or damage which was not occasioned or

facilitated by his neglect. S. P. Holt 131. Vide 1 Vent. 121. 2 Lev. 5.

&c. it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his masters money, and keeps it locked up with a reasonable care, he shall not be answerable for it though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill managment the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy, in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In *Bracton, lib.* 3. 100. it is called *mandatum.* It is an obligation which arises *ex mandato.* It is what we call in *English* an acting by commission.

A man to whom goods are delivered for a purpose in respect of which he is to have no reward, is not answerable for any loss or damage occasioned by a third person.

Case lies for negligently executing a gratis commission. Vide 1 H. Bl. 158.

And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently he is answerable. *Vinnius* in his commentaries upon *Justinian*, *lib.* 3. *tit* 27. 684. defines *mandatum* to be *contractus quo aliquid geratuito gerendum committitur et accipitur.* This undertaking obliges the undertaker to a diligent management, *Bracton*, *ubi supra*, says, *contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis.* I don't find this word in any other author of our law besides in this place in *Bracton*, which is a full authority, if it be not thought too old. But it is supported by good reason and authority. 2 *Ld. Raym.* 919.

The reasons are, first, because in such a case, a neglect is a deceipt to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him.

And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 *Roll. Abr.* 10. 2 *Hen.* 7. 11. a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if after he does not look to them an action lies. For here is his own act, *viz.* his agreement

A breach of a trust undertaken voluntarily is a good ground for an action Vide ante 64, 65.

and promise, and that after broke of his side, that shall give a sufficient cause of action.

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owners trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the* defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing. The 19 *Hen.* 6. 49. and the other cases cited by my brothers, shew that this is the difference. But in the 11 *Hen.* 4. 33. this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court, what if he had built the house unskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to *A* and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in *Yelv.* 4. judgment was

2 *Ld. Raym.* 920.

If a man promises to re-deliver goods in consideration of having them delivered to him, an action will lie against him for not re-

* Vide ante 64, 65. 71.

given that the action would lie. But that judgment was afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. *Yelv.* 128. But those cases were grumbled at, and the reversal of that judgment in *Yelv.* 4. was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 *Cro.* 667. *Tr.* 21 *Jac.* I in the King's bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Mors* v *Slew* was drawn by the greatest drawer in *England* in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point: but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

delivering them Vide ante 57, 58.

THE END.